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No. 3997

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IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HOFFSCHLAEGER COMPANY, LIMITED,

*Plaintiff in Error,*

VS.

MARGARET FRAGA, by Alfred Fraga, her  
guardian ad litem,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the Supreme Court of  
the Territory of Hawaii.

SMITH, WARREN, STANLEY & VITOUSEK,

JESSE H. STEINHART,

JOHN J. GOLDBERG,

*Attorneys for Plaintiff in Error.*

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F. D. MONKTON,

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## Subject Index

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	Page
Statement of case.....	1
Statement of facts .....	3
Contentions of plaintiff in error.....	4
Specification of errors.....	5
Argument .....	15
The motion of plaintiff in error for the withdrawal of a juror and the entry of a mistrial should have been granted .....	15
Evidence that the defendant in an action for dam- ages, is insured against loss is inadmissible and its admission constitutes reversible error.....	17
Evidence that the defendant has offered to compromise the plaintiff's claim is inadmissible and its admis- sion constitutes reversible error .....	20
The law will presume prejudice from the fact that certain inadmissible evidence has been received by the jury .....	24
It is error for a jury to read a newspaper containing inadmissible evidence .....	26
The affidavit of a juror that he read a certain news- paper article is admissible.....	30
The law will presume that jurors have read current newspaper articles dealing with the trial, there being no showing to the contrary.....	31
A motion for the withdrawal of a juror and entry of a mistrial is a proper motion when inadmissible evidence has been placed before the jury.....	35
It is error for a jury to read a newspaper containing inadmissible evidence, although the publication was not caused by the party benefited thereby.....	36



	Page
The restrictions placed by the trial court upon the cross-examination by plaintiff in error of Doctor Osorio constitutes prejudicial and reversible error..	37
Fair and full cross-examination is a <i>right</i> , denial of which is prejudicial and fatal error.....	46
Trial court's refusal to permit the production of medical works and to cross-examine thereon constitutes prejudicial error .....	51
The evidence shows that defendant in error was guilty of contributory negligence as a matter of law, and the trial court erred in refusing to grant a nonsuit upon that ground .....	60
The trial court incorrectly instructed the jury upon the measure of care required of the defendant in error..	65
The motion of defendant in error for a new trial should have been granted upon all of the grounds urged, and upon the further ground that the damages awarded are excessive .....	67
The trial court committed prejudicial error in calling to the attention of the jury the amount of damages claimed by the defendant in error.....	68
Conclusion .....	71

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the Territory of Hawaii.

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This cause is heard by this Honorable Court upon writ of error issued to the Supreme Court of the Territory of Hawaii.

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### Statement of Case.

In her complaint (Tr. p. 34) the defendant in error set out that the plaintiff in error maintained and operated in front of its place of business on Keawe Street in Hilo, on the public sidewalk, a sidewalk elevator used for the purpose of convey-



ing goods from the basement of said place of business to the sidewalk; that at the top of said elevator there was an opening in said sidewalk approximating four feet in width and five feet in length; that when the elevator is not in use the opening is closed by a grating (formed by two gates) which lies even with, and is used by pedestrians as part of the sidewalk; that on August 20, 1920, while the defendant in error was walking along said Keawe Street the plaintiff in error carelessly and negligently permitted one of the gates of said grating to remain open while the elevator was at the bottom of the shaft and that, without fault on her part, the defendant in error fell through the opening to the bottom of the shaft and was greatly injured.

The plaintiff in error entered a general denial to the complaint. After the jury had been impaneled and sworn and after some evidence had been taken the plaintiff in error moved for the withdrawal of a juror and for the entry of a mistrial in the cause on the ground of the publication, subsequent to the drawing of the jury, in one of the newspapers published in Hilo, owned by a corporation of which Mr. J. S. Russell, leading counsel for defendant in error, was president, of an article prejudicial to the plaintiff in error's cause. The motion was denied. A verdict for the defendant in error was rendered by the jury, damages being awarded her in the sum of \$7250.

### Statement of Facts.

The facts briefly, as taken from the record, are as follows: On August 20, 1920, about three o'clock p. m., the defendant in error Margaret Fraga, aged almost thirteen (Tr. p. 166), was walking along Keawe Street (formerly Bridge Street) in Hilo, towards the store premises of the plaintiff in error situate on said street. Shortly before defendant in error appeared on that street the plaintiff in error had opened one of the gates of the elevator opening for the purpose of taking some freight from the store basement and delivering it to a wagon which was shortly expected (Tr. p. 200). The gate opened was that farthest from the defendant in error; a photograph of the grating as so open was introduced in evidence as defendant-in-error's exhibit "H". When both gates are closed the grating extends lengthwise with the sidewalk about forty inches, each gate being twenty inches wide; the sidewalk is between eight and ten feet wide and the grating covers about four feet of this width (Tr. p. 205). The gate when open rises about seventeen inches above the sidewalk and is plainly visible to anybody walking along the street (Tr. p. 206). The defendant in error for about three years immediately prior to the accident knew of the existence of the elevator and its purpose, used to pass it frequently and had very often seen freight unloaded at it (Tr. pp. 168, 175-8, 191-2). Towards and right up to this open grating defendant in



error walked, looking straight ahead and making no movement to avoid it (Tr. pp. 175, 178). She contended that her attention was then diverted, i. e., at the time when she was almost in the opening and it required *but one additional step* to place her therein. She took this step and fell down the shaft (Tr. pp. 168, 175). She sustained, besides a number of more or less trifling injuries, an injury to her left leg, the nature of which will be discussed hereinafter in connection with the errors assigned in the improper restriction of the cross-examination, and the excessive amount of the verdict.

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### **Contentions of Plaintiff in Error.**

The general theory of plaintiff in error's case, underlying the several errors assigned, is that the verdict should be set aside and a new trial ordered for the following reasons:

1. That a mistrial should have been entered in the court below by reason of the fact that during the progress of the trial matters inadmissible in evidence, namely, that the plaintiff in error was protected by insurance and that the insurance firm had agreed to settle the case, were improperly brought to the attention of the jury through the medium of the public press;

2. That by reason of the undue, improper and oppressive restriction of the right of cross-examina-

tion, the plaintiff in error was deprived of the opportunity of making a full presentation of its case and was thereby prejudiced in its right to a fair trial;

3. That as a matter of law the contributory negligence of the defendant in error was such as to preclude her recovery for the injuries complained of;

4. That the defendant in error's instructions complained of are incorrect in that (a) they misstate the care required of the defendant in error, (b) they misstate the law applicable to this case under the facts, and (c) are improper in that the attention of the jury was directed to the sum claimed by the defendant in error;

5. That the verdict was contrary to the law and the evidence and was so excessive that it must be deemed the result of bias and prejudice and/or improper influence affecting the jury, and/or of their misunderstanding of the instructions given to them by the court.

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### **Specification of Errors.**

The errors relied upon by plaintiff in error as they are set forth in the Transcript, pages 372-387, and as therein numbered, are as follows: Nos. 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21 and 24.



**ERROR No. 3.**

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion of the defendant-plaintiff in error duly filed in said cause on May 25, 1921, for the withdrawal of a juror and the entry of a mistrial in said cause, by reason of the publication, after a jury had been empaneled and sworn and the taking of testimony had commenced, of a newspaper article stating that an insurance company was defending the said cause and other matters prejudicial to the defendant-plaintiff in error and calculated to prevent a fair trial of the said cause.

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**ERROR No. 6.**

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made by the defendant-plaintiff in error during the cross-examination of the said witness, V. E. M. Osorio, that he produce in court, for the purpose of further cross-examination of said witness in reference to his testimony as to its contents, a certain surgical work known as De Costa's (a copy of which was at the witness' house in Hilo) mentioned by him on cross-examination as an authority for the opinion testified to by said witness that if an injury such as he testified was suffered by the plaintiff-defendant in error, namely, a partial separation of the epiphysis of the tubercle of

the tibia, did not completely heal within three to four weeks, it would serve no purpose to keep the injured part immobile, and that the patient might then be permitted to walk, and that by giving the injured part as much rest as possible recovery could not be expected more quickly than when the patient was permitted to walk; the trial Judge denying the motion for the reason that he had allowed the witness to be examined and cross-examined on his ability as a surgeon.

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**ERROR No. 7.**

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

“You don’t mean, Doctor, that she would get well quicker by being allowed to walk and move, and having some of the force felt on that muscle than she would if she had not been allowed to walk?”

the said witness having testified previously that the muscle or set of muscles chiefly used in extending the leg, the quadriceps femoris uniting the tendon patellæ—is attached to that portion of the leg which was in the case of the plaintiff-defendant in error alleged to have been injured, namely, the tubercle of the tibia.

**ERROR No. 8.**

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

“Q. And is it not a fact, Doctor, that every time that the plaintiff extended her leg the action of the quadriceps tendon tends to enlarge that separation and prevent ——”

the said witness having testified that the tendon in said question referred to was attached to that part of the leg alleged in the case of the plaintiff-defendant in error to have been injured and having further testified that the object a doctor has in view in treating such an injury is to prevent further separation of the tubercle and to allow the tubercle to get back to its normal position.

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**ERROR No. 9.**

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio, to put to him the following question:

“Q. I will ask you, Doctor, is it not a fact that if you want to guard against any further separation and allow the tubercle to resume its normal position and allow the patient to recover naturally, you must prevent in some way all action of the muscles on the injured part?”



**ERROR No. 10.**

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

“Q. You stated, Doctor, I think, that the allowing of the plaintiff to walk about and extend her injured limb would not delay recovery because you expected by counter-irritation some bone tissue; please explain what you meant.”

the said witness having testified previously as follows:

“Q. Is it not a fact that every time she extended her leg that tendon was pulling on the injured part?”

A. We expected that by due counter-irritation to have a certain amount of bone tissue to heal it. With that protection she had on, it prevented a complete usage of that muscle that controls the ligament.”

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**ERROR No. 11.**

That said Supreme Court erred in holding that the trial Judge committed no error during the course of the cross-examination of said witness V. E. M. Osorio in putting to the said witness and allowing him to answer in the affirmative the following question:

“Q. (by Judge Thompson). Doctor, did you give this girl such treatment as your experience, your ability, and medical science would dictate, under the circumstances?”

the trial Judge having immediately prior instructed the witness that he need not answer the following question put to him by the defendant-plaintiff in error:

“Q. Is is not a fact, Doctor, that an injured leg was during the time of your service in the Expeditionary Forces kept in a sling or hammock so that the muscle affecting the injured part would not lay upon it?”

the said witness having testified on direct examination that he had served as a surgeon with the United States Expeditionary Force in Europe and had there had considerable experience with fractures, and the defendant-plaintiff in error having excepted to the question put as above by the trial Judge on the ground that it did not call for the standard of treatment which the law requires.

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**ERROR No. 12.**

That said Supreme Court erred in holding that the trial Judge was not in error in refusing to allow the said witness V. E. M. Osorio, during his recross-examination by and at the request of the defendant-plaintiff in error, to examine a medical work known as “Keene’s Surgery” which was present in court and which during his redirect examination had been exhibited to the said witness by the plaintiff-defendant in error, identified by the said witness and mentioned by him as an authority during said redirect examination, for the proposition that if an injury such as the plaintiff- defendant in error was alleged

to have suffered did not heal within three or four weeks a recovery could not be expected for some years, and to point out the passage in said medical work to which he, said witness, had reference; and also in refusing to permit the said witness to answer the following question:

“Q. You have cited Keene’s work on Surgery as being an authority for the proposition that if the healing of an injury such as you say plaintiff suffered on August 20th was not effected within three or four weeks it would not heal for years; will you please turn to the passage in Keene to which you have reference?”

the purpose of the proposed cross-examination being to lay the foundation for contradicting and impeaching the testimony of said witness.

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**ERROR No. 13.**

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made by the defendant-plaintiff in error at the conclusion of the recross-examination of the said witness V. E. M. Osorio to strike out all the evidence given by the said witness to the effect that the authorities named by him supported the opinions to which he had testified, on the ground that the defendant-plaintiff in error had not been allowed to cross-examine the witness in regard to said authorities and that the court had refused to order the production of the books and authorities



referred to by said witness so that the defendant-plaintiff in error might be enabled to cross-examine the said witness in reference to his testimony as to their contents.

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**ERROR No. 14.**

That the said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made by the defendant-plaintiff in error at the close of the plaintiff-defendant in error's case that a nonsuit be granted upon the ground that the evidence affirmatively showed such contributory negligence on the part of the plaintiff-defendant in error as to preclude any recovery by her.

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**ERROR No. 15.**

That said Supreme Court erred in holding that the trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

“You are also charged that it is not the law that a person passing along the sidewalk in a city who has no knowledge of any defects therein, is required to be constantly watching for holes in or for obstructions upon, the walk, but he has the right to assume that the walk is in a reasonably safe condition and to act upon that assumption.”

**ERROR No. 18.**

That said Supreme Court erred in holding that the trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

“Upon the question as to whether or not the plaintiff was guilty of contributory negligence in failing to observe the opening into which she fell, you may consider the location of this shaft, the extent to which it covered the sidewalk, whether or not the sidewalk was on a business street, whether or not she acted reasonably in diverting her attention, if her attention was diverted, her age, and such other facts to be found in the evidence bearing upon this issue, and all in the light of the fact that she had a right to assume that the sidewalk was in a reasonably safe condition.”

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**ERROR No. 19.**

That said Supreme Court erred in holding that the trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

“You are further instructed that the mere fact that plaintiff knew of the existence of this elevator shaft and failed to avoid it or failed to look for it in passing to determine whether or not it was open at the time does not render her guilty of contributory negligence as a matter of law and will not as a matter of law preclude her from recovering.”

**ERROR No. 20.**

That said Supreme Court erred in holding that the trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

“The Court further instructs the jury that she (the plaintiff) sued for pain and suffering, which she claims to have sustained. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law for this. You will ascertain from the evidence, if defendant is liable, how much pain and suffering, mentally and bodily, has been undergone by plaintiff, and how much she will undergo if the evidence discloses it. Then you will find for her what you, as impartial jurors, would find from the evidence to be fairly compensatory to her, but in no event in a sum in excess of \$11,500.”

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**ERROR No. 21.**

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made by the plaintiff-defendant in error, duly filed on the 6th day of June, 1921, to vacate and set aside the verdict of the jury awarding to the plaintiff-defendant in error against the defendant-plaintiff in error damages in the sum of \$7250; to vacate and set aside the judgment rendered on said verdict on the 1st day of June, 1921, and to grant a new trial in said cause.



**ERROR No. 24.**

That said Supreme Court erred in holding that the trial Judge was not in error in denying the motion made and duly filed by the defendant-plaintiff in error on the 6th day of June, 1921, to vacate and set aside the verdict of the jury and the judgment rendered thereon for the reason that the damages awarded to the plaintiff-defendant in error were excessive.

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**Argument.**

**THE MOTION OF PLAINTIFF IN ERROR FOR THE WITHDRAWAL OF A JUROR AND THE ENTRY OF A MISTRIAL SHOULD HAVE BEEN GRANTED.**

This motion (Tr. p. 45) was made at the opening of court on May 25th (Tr. p. 129) and was based upon the publication of a certain article (Tr. p. 46) in "The Daily Post Herald" of Tuesday, May 24th. The "Daily Post Herald" is a newspaper of general circulation, printed and published in Hilo, Hawaii, where the trial of this cause took place. It is published by the Hawaii Post-Herald, Limited, a corporation, of which Mr. J. W. Russell, the leading counsel for the defendant in error, is president and a large stockholder (Tr. pp. 51, 54).

The article referred to, a copy of which forms part of the record herein (Tr. pp. 48, 50), was published under a display heading in the first columns of the front page of the newspaper. The

article contained a number of false, misleading and extremely prejudicial statements regarding the defense to defendant in error's claim. The caption, in large type, was as follows: "Fourteen Year Old Hilo Girl seeks \$11,500 damages from *Insurance Firm* for Injuries". It stated that the plaintiff fell down an elevator shaft owned by Hoffschlaeger Co., that the circumstances of the case were *rather unusual*; that the *Insurance Company* was defending the case; that counsel (naming them) are appearing for the *Insurance Company*, which was *shouldering the responsibility* for Hoffschlaeger Co., and that the *Insurance Company* had agreed to *settle for a small amount of damages*, thus pointing out that an offer of compromise had been made, and leaving the reader to deduct therefrom an admission of liability.

It will be noticed that Hoffschlaeger Co. was but casually mentioned in the article, once in connection with the ownership of the elevator and later as having its responsibility borne by another, and that the *Insurance Company* was mentioned *four times*, and the jury, through the public press, was informed that an insurance firm:

- (1) was being sued and was the real defendant;
- (2) was defending the case;
- (3) was shouldering the responsibility; and
- (4) had agreed to settle for a small amount of damages.

It was thus impressed upon the jury that the plaintiff in error had no real interest in the case; that no question as to *liability* for the accident could arise, because the insurance firm, which (according to the article) was the real defendant, had agreed to settle, and that the Insurance Company was unreasonable in only being willing to settle for a small amount.

By means of this article matters were brought to the jury's attention which, even if true, would not have been admissible in evidence, and the admission of which would have been reversible error.

**Evidence that the defendant in an action for damages is insured against loss is inadmissible and its admission constitutes reversible error.**

To the general effect that evidence that the defendant in an action for damages is insured against loss, is not admissible and that its introduction in any way into the case is ground for a reversal of any judgment obtained therein by the plaintiff, see

*Stewart v. Bruce*, 179 Fed. 350;

*Roche v. Llewellyn Iron Works*, 140 Cal. 563;

*Pierce v. United Gas & Elec. Co.*, 161 Cal. 176, 118 Pac. 700;

*Fuller Co. v. Darragh*, 101 Ill. App. 664;

*Loughlin v. Brassil*, (N. Y.) 79 N. E. 855;

*Simpson v. Foundation Co.*, (N. Y.) 95 N. E. 10;

*Manigold v. Black River Traction Co.*, 80 N. Y. S. 861;



*Hordern v. Salvation Army*, 109 N. Y. S. 131;  
*Odell v. Genessee Construction Co.*, 129 N. Y.  
 S. 123;

*Iverson v. McDonnell*, 36 Wash. 73, 78 Pac.  
 202;

*Lowsit v. Seattle Lumber Co.*, 38 Wash. 290,  
 80 Pac. 431.

In *Iverson v. McDonnell* supra, the Supreme Court of Washington reversed the trial court for its error in allowing on the cross-examination of the defendant the introduction of just such information as was conveyed to the minds of the jury herein by the newspaper article in question, because of the undeniable tendency of such information "to either confuse or inflame the minds of the jurors". The Washington court cited and followed

*Manigold v. Black River Traction Co.*, supra. This was an action for personal injuries. The defendant's agent had called on the plaintiff along with a certain doctor. On cross-examination the agent was asked whom the doctor represented. An objection to that and to the following question, "Wasn't he representing the insurance company?", were both sustained and the jury was told by the court to entirely disregard the question. On appeal the verdict and judgment thereon for the plaintiff were reversed, the Appellate Court saying:

"The law is well settled that it is improper to show, in an action of negligence, that the defendant is insured against loss in case of a re-

covery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore*, 66 Hun. 630, 22 N. Y. Supp. 1119.

\* \* \* In the case at bar it is impossible to say whether the statement of the counsel that there was an insurance company behind the defendant influenced the jury in rendering the verdict which it did. We have called attention to the fact that the question as to the extent of the plaintiff's injuries was, upon the evidence, a close question of fact; one that was involved in doubt; and its determination ought not to be prejudiced by imparting to the jury the information that the verdict rendered by it, whatever its amount, would not have to be paid by the defendant, but would be paid by an insurance company, which was back of it."

The New York Court of Appeals has taken the same view. In *Simpson v. Foundation Co.*, supra, it said:

"Evidence that defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even where the court strikes it from the record and directs the jury to disregard it, *unless it clearly appears* that it could not have influenced the verdict."

It is true that the New York court said:

"unless it clearly appears that it (the improper evidence) could not have influenced the verdict."

However, when once such prejudicial information as the Daily Post Herald contained is gotten before the jury it becomes the duty of the party likely to be benefited thereby to see and affirmatively show

that no prejudice results therefrom. In *Manigold v. Black River Traction Co.*, supra, the court said:

“It cannot be said that it (the evidence that defendant was insured) did not have such effect (influence the jury). The plaintiff upon whom the burden should rest, has not satisfied us that the improper statement did not influence the verdict rendered.”

And in *Simpson v. Foundation Co.*, supra, the court said:

“If the answer were unexpected, as claimed, it was the duty of the plaintiff’s counsel himself to move to strike out the evidence and to ask the court to instruct the jury to disregard it. \* \* \* He should have lost no time in getting it out of the record and doing his utmost to correct his mistake. A prompt withdrawal of the evidence by the counsel for the plaintiff would go farther toward correcting the evil than any motion made by the attorney for the defendant. While there was no proof in this case that the defendant was insured, by suggestion and indirection the jury were given to understand that such was the fact and the result, apparently, is reflected in the verdict.”

Furthermore, the New York court seems to have adopted the sensible view that cautionary instructions are of no use once this highly prejudicial information has been placed before the jury.

See *Loughlin v. Brassil*, supra.

**Evidence that the defendant has offered to compromise the plaintiff’s claim is inadmissible and its admission constitutes reversible error.**

Not only was the newspaper article entirely improper in bringing before the jury, as a fact, that



an unknown insurance company was defendant, but also in that it set forth that the insurance company agreed to settle the claim of defendant in error for a small amount of damages. Whether or not this be true, the conveying of such a piece of information to the jury was highly improper.

“The law strongly favors the settlement of disputes outside of court, and to that end seeks in every way to encourage disputants to get together and compromise their differences. Courts realize that often a party to a controversy, though confident of the justice of his position, would rather buy peace than engage in litigation. But no prudent man would dare approach his adversary with an offer of compromise if he thought his adversary would be allowed to take advantage of his offer in court, and exploit it as a confession of weakness. To allay such fear, the courts have always denounced every attempt to prove an offer of compromise or to get before the jury the fact that such offer was made. ‘The rule of law is that all confidential overtures of pacification, or other propositions between litigating parties, stated to be without prejudice, are excluded on grounds of public policy; and the reason of the rule is that, unless so excluded, it would be difficult to take any step towards an amicable compromise or adjustment’. *Ferry v. Taylor*, 33 Mo. 323.”

*Marshall v. Taylor*, (Mo.) 153 S. W. 527,  
530.

That the Marshall case, just quoted from, states the undoubted weight of authority is borne out by the following text writers:

2 *Chamberlayne on Evidence*, Sec. 1440;

1 *Greenleaf on Evidence* (16th Ed.), Sec. 192;

*Underhill on Evidence*, Sec. 75;

2 *Wharton on Evidence* (3rd Ed.), Sec. 1090;

2 *Wigmore on Evidence*, Secs. 1061-2.

The first mentioned writer states the rule as follows:

"Sec. 1440. The Rule of Exclusion.—So highly does the positive law regard the attainment of peace between parties to a controversy that a rule of procedure, the substantive law applied to procedure, has, though with ever decreasing stringency, ordained that if such could reasonably have been the motive for making the offer of compromise it will be taken, as matter of law, that such was the object. It will be assumed that the thought was to buy peace regardless of liability. It is, accordingly, the fiat of procedure that the statement should not be received against the party making it. It is peremptorily rejected, when offered for such a purpose. Any act, other than a statement, done for the purpose of facilitating a compromise settlement will be excluded for the same reasons, should the inferences from it tend to establish a concession of liability on the part of the doer. In certain jurisdictions the mere fact that an offer of compromise has been made, even that an intimation has been extended to the effect that such an offer would be made have been treated as equally excluded by the rule of procedure. All evidence in respect to the terms of such a statement or suggestion is rejected."

The cases of

*Chicago B. & Q. Ry. v. Roberts*, (Colo.)  
57 Pac. 1076;

*Gulf, C. & S. F. Ry. Co. v. Bagley*, (Tex.)  
127 S. W. 254;

*Toledo, etc. Ry. Co. v. Burr*, (Ohio) 92 N. E.  
27;

and

*Home Ins. Co. v. Baltimore Warehouse Co.*,  
93 U. S. 527;

not only expound the rule excluding offers of compromise from the jury but emphasize the added importance and rigidity of that rule when the issue involved, that is, whether or not the defendant is liable in damages, is a close question.

In the Roberts case, *supra*, an action brought to recover damages from the Chicago B. & Q. Ry. for killing a horse, the admission of a letter offering \$35 in settlement of plaintiff's claim was assigned as error. The court said:

"While the ruling is important in this case, since without the letter, the testimony tending to show that the plaintiff's horse was killed by or through the negligent operation of defendant's train was very meager, the real importance of the question is found in the far-reaching effect that its determination may have upon future negotiations by railway companies in the settlement, out of court, of like claims."

In the Texas case, *Gulf, etc. Ry. Co. v. Bagley*, *supra*, the court said that the

"testimony showed an offer of compromise and was inadmissible. The policy of the law



favours such settlements and therefore protects negotiations for that purpose. \* \* \*

“Besides, the testimony bearing upon the controlling question in the case was very conflicting and renders at least doubtful the question of negligence charged on the part of appellant, and the admission of incompetent testimony in such a case, with a view of limiting its consideration, or removing its damaging effect upon the jury by the charge, is a dangerous practice not to be commended.”

The law will presume prejudice from the fact that certain inadmissible evidence has been received by the jury.

To show how strong the policy of the law is that such offers shall not be called to the attention of the jury in any way, the courts have very generally refused to go into the question of how far the fact that evidence of the offer of compromise has gotten before the jury has in fact really prejudiced the defendant,

*Sherer v. Piper*, 26 Ohio St. 476,

and have likewise adopted the view that cautionary instructions are useless once the jurors have heard.

*Gulf, etc. Ry. Co. v. Bagley*, supra;

*Georgia Ry. & Elec. Co. v. Wallace & Co.*,  
(Ga.) 50 S. E. 478;

*McHenry Coal Co. v. Snedden*, (Ky.) 34 S.  
W. 228.

In the Georgia case, *Wallace & Co.*, in an action to recover damages to one of its teams, sought to introduce evidence of a compromise of the claim of the driver of the team, a third party. The defendant's objection to its admission was sustained.

The defendant then moved for a new trial but the motion was denied, the court cautioning the jury that the evidence objected to was not evidence in the case. The Supreme Court, in reversing the trial, said:

“It costs time, trouble and money to defend even an unfounded claim. Parties have a right to purchase their peace \* \* \* The rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful, for the jury will draw conclusions therefrom in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence.”

In the Snedden case, just cited, the Kentucky Court of Appeals reversed the judgment obtained in the trial court, although:

“The attorney for plaintiff then withdrew the statement and told the jury that as the court had sustained the objection, they must give no weight to what he had said in regard to the letter.”

And is the fact that the information, whether true or not, that (1) an insurance company was the party defendant, and (2) that the insurance company had agreed to settle for a small amount of damages, was placed before the jury through the medium of a local newspaper read by at least one of the jurors (Tr. pp. 79, 81), any ground for distinguishing the present case from those many cases which hold the conveying of evidence to such effect

to a jury to be ground for a new trial? We earnestly submit that it is not, either on principle or on authority. And this contention is made at this point without regard to the fact that the plaintiff in error contends that the article was inspired. The fact that there had been any suggestion of compromise of the case was known, as the affidavits on file show (Tr. pp. 57, 78) only to Mr. Stanley and Mr. Fred Patterson, counsel for defendant in error, and colleague of Mr. J. W. Russell, the president of the corporation publishing the newspaper in which the highly prejudicial and colored article appeared. Mr. Patterson was seen in close conversation with a reporter for the Herald, the writer of the article, on the morning of May 24, 1921, while the jury was being impanelled (Tr. p. 74), the article being published on the afternoon of the same day; there is an affidavit from one E. C. Compton (Tr. p. 74) that the reporter told him that he had received his information from one of the attorneys in the case, and while there are affidavits and counter-affidavits from others, there is not a syllable uttered by Mr. Patterson. However, whatever the facts as to the inspiration may be, it remains undisputed that the article, in its nature highly prejudicial to the cause of plaintiff in error, was published, was accessible to the jury and *was read by at least one of them.*

**It is error for a jury to read a newspaper containing inadmissible evidence.**

Every reason for excluding from the jury evidence at the trial that an insurance company will



meet any judgment rendered against the nominal defendant, and for the exclusion of evidence that the defendant had offered to compromise the claim of the plaintiff, exists likewise against the receiving by the jury of that same information in other ways, and more particularly through the public press.

“The widely-read and influential daily journal, speaking for as well as to the public, reflecting popular sentiment as well as making it, must be held to be much more powerful in influencing the average man than any expression of opinion by a single private individual \* \* \*. It seems to us impossible to distinguish between the mischief done by oral or written or printed communications”.

*Cartwright v. State*, 71 Miss. 82, 86.

It is true that a new trial is not granted in every case where the jurors read something in a newspaper relating to the case on trial. The Supreme Court of Hawaii, in its opinion rendered below, affirming the judgment of the trial court, cites in support of that general proposition (Test. p. 357) 20 R. C. L. p. 254, Sec. 36; 2 *Thompson on Trials*, Sec. 2561. Those two authorities state, however, that the reading of an article “does not necessarily call for the granting of a new trial, *if* the article contained nothing of an unfair or prejudicial character” (20 R. C. L. 254), nor “*unless* the newspaper contain reports of the trial or other prejudicial matter in the form of editorial comments or otherwise.” (2 *Thompson Trials*, Sec. 2561.)

That the newspaper article in question was unfair and prejudicial cannot be questioned. The statements contained therein could not have been presented to the jury in any other way without being grounds for the reversal of any judgment obtained by the plaintiff.

To the effect that the reading by a jury of a highly prejudicial or unfair article containing information that could not have been introduced in evidence at the trial is ground for the reversal of any judgment obtained by the plaintiffs and the granting of a new trial, see:

*Mattox v. U. S.*, 146 U. S. 140;

*Meyer v. Cadwalader*, 49 Fed. 32;

*Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 337;

*U. S. v. Ogden*, 105 Fed. 371;

*People v. McCoy*, 71 Cal. 395, 12 Pac. 272;

*People v. Stokes*, 103 Cal. 193;

*People v. Wong Loung*, 159 Cal. 520;

*State v. Tilden* (Idaho), 147 Pac. 1056;

*West Chicago St. R. R. Co. v. Grenell*, 90 Ill. App. 30;

*Trohey v. Chicago City Ry. Co.*, 168 Ill. App. 1;

*Com. v. Landis*, 12 Phila. (Pa.) 576.

The case of *United States v. Ogden*, presents very well the general proposition for which it is above cited. A motion for a new trial was granted because the jurors read a newspaper article which

amongst other things called attention to the fact "that the defendant did not venture to testify in his own behalf," an assertion which neither judge nor counsel would have been permitted to make during the course of the trial.

"I need hardly say that the publishing of such comments during the course of the trial was a flagrant impropriety. If the printed words had been spoken to a juror, or if they had been contained in a letter addressed to him, an offense punishable by fine and imprisonment would have been committed; and it is little less blamable to take the not improbable chance of reaching the juror's mind by the method of publication in a widely-read journal."

The new trial was granted.

The California court said, in *People v. McCoy*, supra:

"There is no doubt, however that the reading of newspapers by jurors, while engaged in the trial of a cause is an inattention to duty which ought to be promptly corrected; and if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial."

The Grenell case, *West Chicago Street Rr. Co. v. Grenell* (supra), 90 Ill. App. 30, 48, states the rule thus concisely:

"That the reading by jurors of newspaper articles prejudicial to one of the parties is cause for a new trial, we regard as well settled. *People v. McCoy*, 71 Cal. 395; *People v. Stokes*, 103 Ib. 193; *Cartwright v. The State*, 71 Miss.



82; Walker et al. v. The State, 37 Tex. 366; Carter v. State, 77 Tenn. (9 Lea) 440; Farrar v. The State, 2 O. St. 54.”

**The affidavit of a juror that he read a certain newspaper article is admissible.**

There can be no doubt that at least one of the jurors in the present case read the prejudicial article in the “Daily Post-Herald” during the trial of the cause (see affidavit of R. F. Forrest, Tr. p. 79, and accompanying affidavit of C. A. Namohala, Tr. p. 81). And there can be no question but that a jurymen can testify or offer an affidavit to the fact that he has read such a newspaper article.

“A jurymen may testify to any facts bearing upon the question of the existence of any extraneous influence although not as to how far that influence operated upon his mind.”

*Mattox v. United States*, supra.

The above case was followed and cited by a case in the District Court for the Eastern District of Pennsylvania, *United States v. Ogden*, supra.

“Here there is positive proof that the article was read, if the jurors were competent witnesses upon this subject. Objection to their testimony was made by the government on the well-known ground that jurors are ordinarily not permitted to impeach their own verdict. But there is no doubt of their competency to testify to the mere fact of having read or seen the newspaper (*Mattox v. U. S.*, 146 U. S. 149, 13 Sup. Ct. 50, 36, L. Ed. 917) although they could not be permitted to testify that the article had or had not influenced their minds. This is an inference which the court is to draw in each particular case, and it will be a more or less

probable inference according to the character of the comments complained of.”

And again, in *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 337, 345:

“Under this authority, (the Mattox case) it was not competent for jurors to prove by their affidavits what influence these articles they read had over them, or what motives actuated them in rendering their verdict. It does not appear what articles the jurors read, but any of the articles from which the above quotations are taken would have had a tendency to influence a juror and make him partial to the defendant. Some of the jurors, in their affidavits, state that they purposely avoided reading the objectionable articles. How, as to most of them, they could have known that they were objectionable, without reading their headlines, or reading a portion of the articles themselves, it is difficult for the court to apprehend.”

Thus it can be seen from those two cases that the plaintiff in error could have done nothing more than was done to show the effect of the reading of the article on the juror or jurors.

**The law will presume that jurors have read current newspaper articles dealing with the trial, there being no showing to the contrary.**

Not only is there a natural deduction from the proof that one of the jurors read the article, that other members of the jury also read it, and probably discussed it, but the law will presume that it has been read without any showing that it was even read by one juror, if there is no showing to the contrary. See *Meyer v. Cadwalader*, *supra*;

*Morse v. Montana Ore-Purchasing Co.*, supra; *State v. Tilden*, supra; *West Chicago St. Rr. Co. v. Grenell*, supra; *Trohey v. Chicago City Ry. Co.*, supra; *People v. Stokes*, supra.

The Idaho Supreme Court in *State v. Tilden*, supra, 147 Pac. 1056, 1060, very well expresses the same principle:

“It is earnestly urged by counsel for the respondent that the showing made by appellant is insufficient upon this point in that it has not been shown that any member of the jury read said newspaper article, in violation of the order of the court, or was influenced thereby in reaching a verdict; neither is it shown that the articles were not cut from the papers, in conformity with the order of the court, before they were given to the jury.

“Since the court carefully instructed the jury to refrain from reading newspaper reports about the trial, and since he also instructed the bailiff to cut from any newspapers given to the jury such reports, it is very apparent that it would be difficult for counsel for the appellant to procure from the members of the jury or the bailiff affidavits that they had violated these orders. It is equally apparent that it would have been an easy matter for counsel for the respondent to procure affidavits that such orders had not been violated, if, in fact, they had not.

“It was incumbent upon counsel for the respondent, if the bailiff cut from the said newspapers the articles complained of, to have presented his affidavit, showing that fact, to the trial court, in opposition to the motion for a new trial, and it was likewise incumbent upon counsel for the respondent to have presented the affidavits of the members of the jury show-

ing that they had not read the articles complained of if they had not. The failure to do this raises a strong presumption that the newspapers, containing such articles, got into the possession of the jury while it had the case under consideration, and that said articles were read by its members. The law upon this point, as we view it, is clearly stated by Chief Justice Sharkey in the majority opinion of the court in the case of *Hare v. State*, 4 How. (Miss.) 187, as follows:

“‘It seems to me that the line of distinction is here so clearly drawn that it is impossible to mistake it, and so fortified by reason as to place it beyond doubt. It is briefly this: If the purity of the verdict might have been affected, it must be set aside; if it could not have been affected, it will be sustained.’”

In the Trohey case,—*Trohey v. Chicago City Ry. Co.*, supra,—the Illinois court cited and followed *Meyer v. Cadwalader*, supra; *People v. Stokes*, supra; and *West Chicago St. Ry. Co. v. Grenell*, supra. To quote at length:

“That such an article, published in a newspaper of general and wide circulation, was well calculated to strongly prejudice the jurors against the defendant in the case, we think too clear to admit of question; and, while there is no intimation that the plaintiff was in any way responsible for the fact, its probable effect upon the jurors must have been exceedingly harmful. It is true, there is no positive and direct evidence that the jurors read the article, but we do not regard it as necessary that such a showing should be affirmatively made. In *Meyer v. Cadwalader*, 49 Fed. 32, a new trial was granted upon substantially the same showing that was made in this case without any direct evidence



being offered that the jurors had read the objectionable matter. In passing upon the question the court said:

“ ‘It is idle to say that there is no direct evidence that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session, and it is incredible that, going out into the community, they did not see and read these newspapers. That these public statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict.’ ”

“In *People v. Stokes*, 103 Cal. 193, the court was considering the effect of similar newspaper publications upon a jury, and was passing upon the question whether or not it must be affirmatively shown that the jury were actually influenced thereby and the court said that ‘the rule laid down by the foregoing cases, namely, that where an irregularity is shown that may have influenced the result, it is for the successful party to show as a matter of fact it did not, rests upon sound principles’ (citing Section 27, Hayne on New Trial and Appeal).

“In *West Chicago Street Railroad Company v. Grenell*, 90 Ill. App. 30, this court passed upon the probable effect upon a jury of an article seriously reflecting upon the railroad company, against which a verdict was recovered in the court below, and Mr. Justice Adams, delivering the opinion of the court, said: ‘The articles also plainly intimated that witnesses for appellant were bribed and were, for other reasons, unworthy of credit’.

“And, upon a showing that newspapers, containing the articles in question, came into the hands of the jurors, this court reversed the judgment of the court below, and said: ‘In short, the probable effect of the articles on the mind of the ordinary juror would be to prejudice him against the appellant and its witnesses, and to intimidate him, and swerve him from an impartial consideration of the case.’

\* \* \* ‘It has been held in cases like the present, that direct evidence that newspaper articles prejudicial to one of the parties were read by the jurors, or some of them, is not necessary to warrant the granting of a new trial; that it may be inferred from circumstances that the jury read the articles.’ \* \* \* ‘That the reading by jurors of newspaper articles prejudicial to one of the parties is cause for a new trial, we regard as well settled. *People v. McCoy*, 71 Cal. 395; *People v. Stokes*, 103 Id. 193; *Cartwright v. The State*, 71 Miss. 82; *Walker et al. v. The State*, 37 Tex. 366; *Carter v. State*, 77 Tenn. 440.’ \* \* \* ‘No affidavits of jurors were produced denying the reading of the articles in question, although it is familiar law that the affidavits of jurors to sustain their verdict are admissible. We are of the opinion that on the affidavits in respect to the articles in question, the court should have granted a new trial.’ ”

**A motion for the withdrawal of a juror and entry of a mistrial is a proper motion when inadmissible evidence has been placed before the jury.**

The Supreme Court of Hawaii, in its opinion below (Tr. p. 360). did not decide that the motion of plaintiff in error to withdraw a juror and enter a mistrial was an erroneous method of procedure to have undertaken. The following authorities, all

of which have already been cited, are cases involving the denial of such a motion by the trial court, and the reversal by the appellate court, of the judgment rendered by the trial court because of such denial. *Meyer v. Cadwalader*, 49 Fed. 32; *Laughlin v. Brassil*, (N. Y.) 79 N. E. 855; *Simpson v. Foundation Co.*, (N. Y.) 95 N. E. 10. See also *Vaughan v. Magee*, 218 Fed. 630.

Thus we see that plaintiff in error acted properly in trying to protect itself from the prejudicial effect of the jury's having received the information conveyed to it by the article in the Daily Post-Herald. We say "conveyed" advisedly for as we have said above, we believe the article was "inspired" and that the facts bear out our belief.

**It is error for a jury to read a newspaper containing inadmissible evidence, although the publication was not caused by the party benefited thereby.**

However, we need not and do not depend upon the motive or authorship of the article. The cases of *Morse v. Montana Ore-Purchasing Co.* supra; *Trohey v. Chicago City Ry. Co.*, supra, both bear out the contention that it is immaterial who caused the publication of the objectionable articles.

"As to whether or not the defendant instigated the publication does not appear, \* \* \* it is not always requisite, however, that any undue influence brought to bear upon a juror should be the act of either party. In the case of *Mattox v. U. S.*, supra, a bailiff in charge of the jury presented to it the damaging publica-

tion. In *Hayne on New Trial and Appeal* (section 48) it is stated:

“‘It cannot be doubted that where attempts to influence jurors are made with the knowledge or acquiescence of a party they must be considered as made by himself, and necessitate a new trial. The cases, however, go further and hold that attempts to tamper with a jury, made by the relatives or friends of a party without his knowledge, are causes for setting aside the verdict.’

“\* \* \* That (the articles) were written or instigated by persons friendly to the defendant, their contents leave no room to doubt. I would go further and hold, however, that if it can be established that the verdict of a jury was influenced by any one, even though not a party to the suit, or a relative or friend of such party, it ought not to stand. The verdict of a jury should be the result of its unbiased action. When a jury is influenced by such articles as are presented in this case, it is difficult to prove who instigated them.”

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**THE RESTRICTIONS PLACED BY THE TRIAL COURT UPON THE CROSS-EXAMINATION BY PLAINTIFF IN ERROR OF DOCTOR OSORIO CONSTITUTES PREJUDICIAL AND REVERSIBLE ERROR.**

The specific errors to be considered under the above heading are numbered 6, 7, 8, 9, 10, 11, 12 and 13. Of these, errors numbered 7, 8, 9 and 10 relate to testimony sought to be elicited from the witness, Doctor Osorio, upon his cross-examination, to which evidence objections were sustained by the trial court. Error No. 11 relates to an improper question asked by the trial court of the



witness on his cross-examination, and errors numbered 6, 12 and 13 relate to the refusal of the trial court to permit the witness to be cross-examined upon medical authorities cited by him in support of his testimony. These various groups of error will be taken up in the order named. In order properly to understand the importance of the testimony sought to be elicited from the witness upon cross-examination and the seriousness to plaintiff in error of the rulings of the trial court, it is necessary to explain briefly the precise nature of the alleged injury and the physiology of the part said to have been affected.

Whatever injury there may have been was to the left leg at a place about one inch below the head of the tibia or anterior bone of the lower part of the leg. Every bone has at each end what is known as an "epiphysis" which differs during adolescence from the shaft of the bone in being not truly bone but of an osseous nature (sometimes called "soft bone"), and which as maturity is approaching calcifies and hardens, and becomes bone from the twentieth to the twenty-fifth year (Tr. pp. 236-8). The epiphysis is separated from the main part or shaft of the bone by cartilage or cartilaginous substance, which is called the "epiphyseal cartilage" and in an X-ray plate appears darker than the bone (in a picture, lighter) and is called the "epiphyseal line" (Tr. pp. 23, 7). Connected with and part of the epiphysis at the upper end of the tibia and about one inch below the head thereof, is a

tongue-like downward projection which runs parallel with the shaft of the bone and is known as the tuberosity or tubercle; as used by medical men the "epiphysis proper" and the "tubercle" are spoken of as two different parts of the epiphysis (Tr. pp. 238, 240-247). In Exhibit "C" the epiphyseal line separating the epiphysis proper, body or main part of the epiphysis, from the shaft is shown by the line marked "a-c" and the part separating the tubercle from the shaft is shown by the continuation of that line marked "a-d".

To the "tubercle" is attached the tendon called the "patella ligamentum" which passes over the knee, and to which are attached the four powerful muscles of the thigh called "quadriceps femoris" and through this tendon or set of muscles tension is applied to, or there is a pull on, the tubercle every time the leg is extended or flexed (Tr. pp. 243, 266, 267, 318, 319).

As regards the epiphysis there may be three kinds of injuries: (1) a fracture of the epiphysis proper, (2) a fracture of the tubercle, and (3) a separation of the tubercle or tubercular end of the epiphysis. A fracture of the epiphysis or epiphysis proper as used by medical men means a fracture of that portion of the epiphysis shown on Exhibit "C" above the line "a-c" and would represent a "much more serious condition" and an injury "totally distinct and recognized as totally distinct" from separation of the tubercle (Tr. pp. 240-242, 246, 247). Besides a fracture of the epiphysis proper there

can also be a *separation* thereof, and this again is distinct from a "separation of the tubercle" and is a very serious and often fatal injury (Tr. pp. 240, 242). There is also a great distinction between a *fracture* of the tubercle and a *separation* of the tubercle (Tr. pp. 240, 242).

On Dr. Osorio's direct examination he testified that he diagnosed the injury as a "separation at the epiphyseal end of the bone from the main shaft" (Tr. pp. 215, 216), and on cross-examination as a "fracture of the whole of the epiphysis to its full extent" (Tr. p. 236). On further cross-examination this position was abandoned by him and he admitted that the *only injury* he claimed to exist was a *separation* and *not even a fracture* of the tubercle (Tr. p. 240). He admitted that there is always up to maturity a normal amount of separation as shown by the epiphyseal line, the width of such separation differing with different individuals and (Tr. pp. 239, 252, 253) varying at different ages and, as the epiphysis ossifies, gradually becoming smaller and smaller (Tr. p. 247); that the separation shown in Exhibit "C" on the epiphyseal line "a-c" was normal and that the only abnormal separation appeared below the point marked "a" and between that and the end of the tubercle at the point marked "d". It will thus be seen that there was finally claimed no injury to the *epiphysis proper* and no *fracture* of the tubercle, the possible injuries mentioned as (1) and (2) above.

On his direct examination Dr. Osorio testified that while the leg showed at the time of trial some improvement, there was still considerable swelling below the knee at the calf; that there was still separation; that this condition might continue or last until she was between the ages of twenty and twenty-five; and that he thought that at that time it would be cured to "a certain extent", "not a complete cure" (Tr. pp. 220, 221).

On cross-examination the doctor testified finally to a *separation of the tubercle*; that the recognized treatment for such a condition is *rest* and bandaging and that the healing of such an injury under proper treatment generally takes place within from three to five weeks (Tr. p. 243). The evidence of the defendant in error was that at the expiration of two weeks after the accident she was walking around her house, was not regularly in bed and went back to school on September 11th (Tr. pp. 181, 184, 192). The evidence of Dr. Osorio was that at no time was the injured leg kept immobile (Tr. pp. 263, 280, 281); that his instructions were that she be left quiet in bed with "as little motion as possible" (Tr. p. 214), with pillows on either side which would prevent to some extent motion in the bed "as long as they were kept in position" (Tr. p. 281), and that at the expiration of three weeks he permitted the defendant in error to attend school, and walk around her house and yard and the school



premises. The reason given by him for thus allowing the defendant in error to walk around was that

“Walking would not ‘necessarily’ or ‘ordinarily’ or ‘under any circumstances’ retard recovery because ‘after the separation showed no complete healing at the end of 3 or 4 weeks it is unnecessary to keep the patient in bed for if you don’t get recovery in that time it will surely not develop at the end of 9 months’ ” (Tr. pp. 264, 265).

He took the same position later when he testified that:

“If the separation does not heal, there is *nothing to do* but to *leave it alone*, and let nature take care of it” (Tr. p. 288).

He further testified that under the treatment he was giving it, even when allowing the defendant in error to walk around, he did not expect that the leg would heal speedily, but expected the leg to heal “not speedily, but slowly” (Tr. p. 264).

He also testified that the injured leg was never kept *immobile*, that the adhesive plaster which he first applied and the rubber bandage later substituted for it would both allow flexion and extension of the leg and permit the play of the tendon on the injured part.

All of the above was developed on the cross-examination of Doctor Osorio, and the whole purpose of his cross-examination was to show by him that the injury, if any, was of a *minor character*; that there was nothing whatever to justify the claim of a *permanent injury*; that the action of the

tendon and muscles on the tubercle to which they were directly attached tended to enlarge the separation and retard union or healing; that if that action were prevented a complete cure could speedily be effected; to discredit the witness; and, by confronting him with the authorities on which he relied, to show while he was on the witness stand that there was no authority for the position taken by him that a complete cure might never be expected and that it was only when the defendant in error reached her twentieth or twenty-fifth year that a cure to "a certain extent could be expected".

When it is borne in mind that heavy damages could be awarded only in a case of permanent injury, or an injury lasting for a number of years, it will be readily recognized that Dr. Osorio's evidence in chief had to be broken down and discredited, and that *great latitude* should have been allowed in the conduct of his cross-examination, which we submit did, to the extent it was allowed, considerably weaken the doctor's evidence on direct examination.

In view of the contention of plaintiff in error, as substantiated fully by the testimony of its witness Dr. L. L. Sexton (Tr. pp. 307-342) that the injury to defendant in error's leg was not serious nor permanent but that with ordinary care would completely heal in not to exceed six weeks, and in view of the fact that many of the jurors, as appears from their names (Tr. p. 47), and the witness Dr. Osorio, are natives of Hawaii, and that, therefore,

in all probability his testimony would receive greater weight than that of Dr. Sexton, it was extremely important to the defense of plaintiff in error that such testimony of Dr. Osorio on cross-examination as conflicted with his direct examination or threw doubt upon the value of the treatment rendered by him, or the conclusions stated by him, should have been permitted to have been stated by the witness to the jury in the unequivocal manner required by the questions which the trial court refused to have answered.

The testimony already elicited from the witness upon cross-examination having shown that the tendon known as "patella ligamentum" is attached to that portion of the leg which is alleged to have been injured, the tubercle, plaintiff in error was entitled to the direct statement from the witness that each time the leg was extended the action of the tendon would be to pull upon the tubercle and thus enlarge its separation and prevent healing (Error No. 8). Likewise, the witness should have been permitted to answer the question whether it was his conclusion that the defendant in error would get well sooner by being allowed to walk and move than if she had not been allowed to walk (Error No. 7) and whether or not it was not necessary to prevent any action of the muscles on the injured part in order to guard against further separation of the tubercle and to allow it to resume its normal position and recover naturally (Error No. 9).

In answer to a question on cross-examination whether it is not a fact that each time plaintiff in error extended her leg the tendon was pulling on the injured part, the witness testified that he had expected by due counter-irritation to have a certain amount of bone tissue to heal it (Tr. p. 267). The witness was then asked on cross-examination (Tr. p. 272) to explain what he meant by counter-irritation. The trial court without objection having been made by counsel for defendant in error stated to the witness that he need not answer the question (Error No. 10). That this was extremely prejudicial to plaintiff in error must be apparent from the fact that the witness was offering to the jury his theory of counter-irritation as the reason and justification for permitting defendant in error to walk and otherwise use the muscles of her leg, and that this explanation, therefore, satisfied the jury that the form of treatment given and to be given by the witness was proper, even though there were serious disadvantages in such use of the leg which might otherwise impede recovery. The testimony of Doctor Sexton (Tr. pp. 327-329) was that the theory of counter-irritation is not applicable to the kind of injury here involved and could be of no value in effecting healing. In the absence of any testimony on the part of the witness Dr. Osorio to the contrary, it is undisputed that such purported counter-irritation could not justify the use of the muscles of the leg for walking and other purposes, and had the witness been permitted to explain just what



he meant by such counter-irritation his view would have been put squarely before the jury, who could have determined in connection with the testimony of Dr. Sexton, whether or not such walking on the part of the defendant in error would impede her recovery. But the trial court having of its own motion stated to the witness that the question did not need to be answered, the jury were justified in assuming that the testimony of the witness was sufficient justification of the plan of treatment used and to be used, without further explanation. This completely beclouded the contention made and sought to be established by plaintiff in error from the cross-examination of Dr. Osorio, that the injury itself would not, under proper treatment, be a permanent one nor continue for the length of time stated by him, and that such injury would be permanent only if the witness persisted in his treatment and contention that such use of the muscles of the leg for walking and other purposes, while it would continue the separation of the tubercle, was in some way compensated by the theory of counter-irritation.

**Fair and full cross-examination is a right, denial of which is prejudicial and fatal error.**

That ordinarily the extent to which cross-examination may go is in the discretion of the trial court is undisputed. It is just as well settled, however, that the right to cross-examine is a *right* and not a privilege, where it is sought to be exercised as to the very issues involved; and where restriction of

such right prevents a party from eliciting from the witness testimony contradictory of his testimony upon direct examination upon the very matters at issue, it is error and is presumed to be prejudicial.

In the Federal courts the law as above stated has frequently been set forth in unequivocal language. The following excerpts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Resurrection Gold Mining Co. v. Fortune Gold Mining Company*, 129 Fed. 668, 65 C. C. A. 180, 186 to 189, illustrates admirably the extent to which the right of cross-examination is protected by the Federal courts:

“A fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of his right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary with the trial court.” \* \* \*

“On the other hand, the right of cross-examination upon the subjects opened by direct examination is invaluable, and it should be carefully preserved. Under the English and American systems of jurisprudence the opportunity to exercise the right of cross-examination is a condition precedent to the reception of the direct evidence of the witness. *Heath v. Waters*, 40 Mich. 457, 471; *Sperry v. Moore's Estate*, 42 Mich. 353, 361, 4 N. W. 13. The right of cross-examination is the great safeguard against fraud, false statements, and half truths resulting from statements of part, and omissions of other parts, of conversations and transactions, which are frequently more mis-

leading and dangerous than direct falsehoods. It furnishes the cardinal and most effective means to discover and disclose the whole truth in all judicial investigations. It extends to the eliciting of every fact relative to the matters recited in the direct examination, which either conditions, qualifies, or weakens the statements there made, or supplies any omission in the earlier testimony of the witness concerning the subjects there treated. *Martin v. Elden*, 32 Ohio St. 297; 1 *Thompson on Trials*, p. 406. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called, and not that of the party on whose account the cross-examination is conducted. The former, and not the latter, is bound by the evidence elicited upon the cross-examination. *Wilson v. Wagar*, 26 Mich. 457, 458; *Campan v. Dewey*, 9 Mich. 417, 418. Hence it is no answer to a refusal to permit a full cross-examination that the party against whom the witness was called to testify might have made him his own witness and then have propounded to him the questions to which he was entitled to answers upon the cross-examination. 'No one is required to make his adversary's witness his own to explain or fill up a transaction he has partially explained already.' He has the right to bind his adversary by the truth elicited from his own witness. *Chandler v. Allison*, 10 Mich. 460, 473; *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644, 660." \* \* \*

"One is not deprived of his right of cross-examination by the fact that he may be able to obtain testimony tending to establish the fact he seeks from his own witnesses. If he were, the right of cross-examination would in the large majority of cases cease to be. A party has the right, if he can do so by proper cross-examination, to prove the facts he relies upon by the cross-examination of the witness of his

adversary, by whose testimony the latter is concluded, although he may be able to introduce other witnesses to establish the same facts." \* \* \*

"Nor can counsel escape a reversal of the judgment below upon the theory that, although this ruling was erroneous, it was not injurious to the defendant, and that for two reasons: In the first place it is the general rule of the federal courts that error produces prejudice, and that it cannot be disregarded unless it appears beyond a doubt that the error complained of did not prejudice and could not have prejudiced the rights of the party who assigns it. *Boston & Albany Railroad v. O'Reilly*, 158 U. S. 334, 337, 15 Sup. Ct. 830, 30 L. Ed. 1006; *Deery v. Cray*, 5 Wall. 795, 807, 18 L. Ed. 653; *Gilmer v. Higley*, 110 U. S. 47, 3 Sup. Ct. 471, 29 L. Ed. 62. In the second place, the presumption is that the answer to a question propounded would have been favorable to the party who asked it, that he would have followed the inquiry thus opened farther, and that his cause was prejudiced by the suppression of the investigation. *Martin v. Elden*, 32 Ohio St. 282, 287; *Buckstaff v. Russell*, 151 U. S. 626, 637, 14 Sup. Ct. 448, 38 L. Ed. 292; *Atchison, Topeka & S. F. R. Co. v. Phipps*, 125 Fed. 478, 480, 60 C. C. A. 314."

Language to exactly the same effect was subsequently used by the same court in *Heard v. United States*, 255 Fed. 829, 832, et seq. In each of the foregoing cases the judgment of the lower court was reversed by reason of the improper restriction of the right of cross-examination.

The rule that when a court can see affirmatively that the error complained of worked no injury to the party appealing, it will be disregarded, is not



applicable to an improper restriction of the right of cross-examination unless it appears so clearly as to be beyond doubt that the error did not and could not have prejudiced their rights. This rule was stated by the United States Supreme Court in *Deery v. Cray*, 5 Wall. 807, and was subsequently approved by the same court in *Gilmer v. Higley*, 110 U. S. 47, and *Eames v. Kaiser*, 142 U. S. 488. See also,

- 1 *Greenleaf on Evidence*, Sec. 446;
- Chamberlayne's Law of Evidence*, Sec. 3721;
- 5 *Jones on Evidence*, Sec. 842;
- 1 *Thompson on Trials*, Second Edition, Sec. 406;
- Prout v. Bernard's Land & Sand Co.*, 77 N. J. L. 722, 73 Atl. 487, 25 L. R. A. S. 635, note.

In view of the fact that the questions directed to Dr. Osorio on cross-examination, which he was not permitted to answer, pertaining to the effect of the treatment given and to be given by him to the defendant in error, had a direct bearing upon the question of whether the principal injury complained of was a permanent or temporary one, and that this constituted one of the foremost issues in the case, and in view of the further fact that the verdict of the jury was undoubtedly based and could only have been based upon the conclusion that the injury is a permanent one, there can be no question, in the light of the foregoing authorities, that the restriction of the cross-examination of Dr. Osorio

was extremely prejudicial and fatal to the defense of plaintiff in error.

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**TRIAL COURT'S REFUSAL TO PERMIT THE PRODUCTION OF  
MEDICAL WORKS AND TO CROSS-EXAMINE THEREON CON-  
STITUTES PREJUDICIAL ERROR.**

By referenec to assignment of Error No. 4, on page 373, of the Transcript, it will appear that in such cross-examination Dr. Osorio referred to the books of certain medical authors in support of his testimony. The record at this point indicates that the authorities were cited merely in support of the statement that cartilage and bone heal in the same period of time and that this takes generally from three to five weeks. From the motion made by counsel for plaintiff in error for the production of these books, appearing on page 249 of Transcript, and from the question of counsel for defendant in error on redirect examination of the witness as to the same matter, on page 294 of Transcript, it would seem to be entirely clear that the authorities referred to by Dr. Osorio were so referred to by him in support of his testimony that if the injury to defendant in error's leg, such as had been testified to, did not heal within the first three to five weeks, it could not be expected to heal until after some years. But though the record is not without some doubt upon this particular assignment of error, this question does not arise as to the assignments numbered six and twelve. On page 265 of the Tran-

script, upon the cross-examination of Dr. Osorio, the following occurred:

“Q. Have you any authority, Doctor, to which you can refer, except your own, to the effect that if the injury is not healed within three or four weeks, it is not necessary and will serve no purpose to keep the injured part immobile?

A. I will mention De Costa.

Q. Have you De Costa with you?

A. I have it over at the house.

Q. And when you refer to De Costa, a surgical work published by De Costa, he is supposed to be a surgeon in Jefferson University?

A. Yes.

Q. And if you had De Costa could you refer us to the passage in that work to which you are using in support of your statement?

A. Yes, sir.

Q. (Judge Stanley) If the court please, I now renew my motion that the witness do procure the book to which he has referred, that I may be able——

JUDGE THOMPSON. The court overrules the motion, for the reason that the court allowed this witness to be questioned and even cross questioned on his ability as a surgeon, in attempting to disqualify or qualify his statements.”

Upon the re-direct examination of Dr. Osorio by counsel for defendant in error (Tr. p. 284), the Doctor testified that Keene also is authority

“upon the proposition that if the healing of an injury such as plaintiff has suffered would not be effected from three to five weeks that you cannot expect a recovery until after some years.”

The witness answered that Keene is such an authority and that it is a standard work. Thereupon counsel for defendant in error exhibited Volume II of the work to the witness and asked him to find the portion thereof substantiating his testimony. The trial court refused to allow this stating that it could not be done on re-direct examination. Thereupon counsel for plaintiff in error asked the witness to turn to that portion of Keene's work supporting his testimony and again the trial court refused to allow this, stating that it was "getting beyond the rules of evidence" (Tr. p. 285).

It is well established in most jurisdictions that it is not competent to read from medical authorities to the jury upon direct examination. It is just as well established, however, that where a witness refers to a medical authority in support of his testimony he may on cross-examination be confronted with such authority and asked to read therefrom in support of his testimony or the jury may be shown, by reading from the work, that the same does not support the testimony given. The general rule and the distinction are stated in 3 *Wigmore on Evidence*, Sec. 1700, as follows:

"It has been in some Courts held that counsel *on cross-examination*, may, for discrediting purposes, read a professional treatise as opposing the statement of an expert on the stand, or ask whether a contradictory opinion has been laid down by others. But this is generally repudiated. There is here, however, a legitimate use,



i. e. where a witness has been allowed to refer to a treatise as corroborating him, *the treatise may be read to show that it does not contain such corroboration, on the principle, (ante, Sec. 1000) of discrediting a witness by showing mis-statements on a material point.* This orthodox purpose, as expressly distinguished from the indirect introduction of the books on their own credit (as above noted), is fully recognized."

Quoting from *Pinney v. Cahill*, 48 Mich. 487, 12 N. W. 862, to the same effect:

"It was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and enable the jury to see that the book did not contain what he had ascribed to it."

The extreme importance of permitting the party to confront a medical witness with the authority relied upon by him, lies in the fact that unless impeachment in this manner is permitted, an incompetent medical witness could give unfounded and unsound opinions which would carry some semblance of weight and authority by reason of the names of prominent persons in that field to whom such witness could refer as substantiating his opinions. That this is the reason for the rule appears from the following portion of the opinion in *Clark v. Commonwealth*, 63 S. W. 740:

"Where a physician testifying for the prosecution as an expert refers to a medical author as supporting his view, the defendant *should be permitted to cross-examine him as to what the author states*, so as to lay the foundation for reading the authority to the jury for the purpose of discrediting the witness. \* \* \*

“And we think such must be the sound view; otherwise an ignoramus in a profession might, by an assertion of learning, declare the most absurd theories to be the teachings of the science of which he was a professed expert, and, when pressed upon cross-examination as to either his own experience or the basis of his learning, would be enabled to hide behind the formidable name of some standard author, and thus foist upon the jury a most hurtful falsehood as a scientific deduction, asserted by the most eminent in the profession, solemnly declared and promulgated by him for the guidance of his brethern and the service of mankind. Therefore, in a case where such a witness makes such an attempt, it is just and reasonable that the opposite side should be permitted to test the truthfulness of his statement, and expose his ignorance or mendacity *by either compelling him* to admit upon an inspection of the authority that it does not sustain his views, or by reading the authority to the jury to prove that it does not, and that the witness, either through ignorance or base motive, has falsely deposed.”

We are confident that the reason and the justice of the rule above stated commend themselves most strongly to this honorable court and that their application to the proceedings in this case demonstrate that prejudicial error has been committed by the trial court.

As to the first group of authorities cited by the witness and to the work by De Costa referred to by the witness, under assignment of Error Number 6, (Tr. p. 265) it was necessary for the witness to go to his home and office in the town of Hilo to procure

them. This he was willing to do (Tr. p. 248) and as the trial itself consumed several days and the witness was on the stand during a great deal of that time, it would have been no hardship to have asked the witness to bring one or all of these works into court upon the reconvening of court after any afternoon or evening adjournment. While it may be said that thus to instruct the witness to bring books into court with him may be in the trial court's discretion, such discretion must, as in all cases, be exercised reasonably. Under the present circumstances, where the only proof of the permanence of the injury to defendant in error was the testimony of Dr. Osorio, claimed by him to be supported by eminent medical authors, it was highly important to the defense of plaintiff in error that the jury be informed to what extent if at all such medical authors would in fact subscribe to the opinion of the witness. On its face, the opinion of the witness that merely because the injury did not heal in the first three weeks it could not be expected to heal until the defendant in error had reached her twentieth or twenty-fifth year or at least not for some years, seems incredible, particularly in the light of the flat contradiction of this view by Dr. Sexton. If in this situation plaintiff in error could have confronted Dr. Osorio with the works relied upon by him in support of his opinion and the Doctor had himself shown by his reading from those works to the jury that they did not support his opinion, the effect upon the jury must un-

doubtedly have been that they would not have accepted Dr. Osorio's contention and would have found that the injury was not permanent but could readily be healed within a few weeks.

Under circumstances of this nature, and where the books to be produced were so readily accessible, and such production would not have delayed the conduct of the trial, it must be considered as an abuse of the discretion vested in the trial court not to require such production.

But in the trial court's refusal to permit a cross-examination of the witness upon the medical work cited by him, known as Keene's Surgery (assignment of error No. 12), no question of discretion vested in the trial court was involved. It was not necessary to ask the witness to produce the book. The book was in court, it had been shown to the witness by counsel for defendant in error on re-direct examination while he was on the stand, and it was immediately thereafter again shown to the witness on recross examination by counsel for plaintiff in error. The witness had cited this authority as a standard work upon the proposition that the injury complained of, not having healed within three to five weeks, could not be expected to heal for some years. This conclusion was upon one of the most important issues before the trial court; the plaintiff in error had a right to compel the witness to turn to that portion of the authority relied upon by him to make him prove that it did in fact sustain his opinion.



The matter was directly in issue, and no question of discretion to permit cross-examination upon collateral or irrelevant issues was involved. That the trial court completely confused the rules of evidence concerning the admission of extracts from medical works, and ignored entirely the distinction set forth in the authorities above quoted, is clear from the court's comment (Tr. p. 285) that counsel's request of the witness to point out the relevant portion in Keene was "getting beyond the rules of evidence". It appears further from this attitude of the court and from its refusal to permit any portion of the book to be read on redirect examination that the court considered the book and every portion thereof incompetent evidence for all purposes, and would not have permitted the plaintiff in error to read any portion of the work to the jury even though that portion be in contradiction of the testimony of the witness. Further proof of the trial court's inability to grasp the point of counsel's purpose in asking that the witness be confronted with the authorities cited by him appears in its comment (Tr. p. 266) in overruling the motion for the production of the surgical work by DeCosta, that the reason for such ruling is that the court

"allowed this witness to be questioned and even cross questioned on his ability as a surgeon, in attempting to disqualify or qualify his statements".

Thus it is evident that the trial court considered that the medical works were sought to be used by

plaintiff in error as direct proof of the matters contained therein or else the trial court labored under the misapprehension that once a medical witness has qualified as an expert, his testimony cannot be impeached, even by the very authorities relied upon by him.

Further misunderstanding by the trial court of the purpose of using the medical works in question, and of the principal issue, whether the alleged injury was temporary or permanent, appears from the question by the trial court to the witness (Tr. p. 279), whether the witness had given the defendant in error such treatment as his experience, his ability and medical science would dictate, under all circumstances (assignment of error No. 11). The trial court believed apparently that the purpose of the cross-examination was to prove lack of skill on the part of the witness in treating the defendant in error and thus impute such negligence to the defendant in error, herself. This, of course, is not the true measure of care required of the defendant in error in employing a qualified physician and surgeon. It was never the purpose of plaintiff in error to hold defendant in error liable for the result of treatment which plaintiff in error contends was improper. The only purpose was to show that if the alleged injury had not yet healed at the time of trial it was only because the treatment pursued by the witness was improper, and that the substitution of proper treatment would result in a speedy and complete recovery. The trial court

by its question to the witness as above set out, and the latter's affirmative answer definitely informed the jury that they did not need to consider the kind of treatment theretofore rendered by the witness so long as the witness vouched for it as proper. This, of course, was consistent with the court's refusal to permit any showing that the authorities relied upon by the witness for his treatment did not support him. In each respect, therefore, the action of the trial court was highly prejudicial to the attempt of plaintiff in error to prove the alleged injury to be merely a temporary one.

From the foregoing it follows that the trial court committed further error (assignment of error No. 13) in refusing to strike out all of the testimony given by Dr. Osorio to the effect that the medical authorities named by him supported the opinions which he gave in his testimony.

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**THE EVIDENCE SHOWS THAT DEFENDANT IN ERROR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW, AND THE TRIAL COURT ERRED IN REFUSING TO GRANT A NONSUIT UPON THAT GROUND (ASSIGNMENT OF ERROR NO. 14).**

The accident in question happened at 3 o'clock in the afternoon, in broad daylight. The grating on the sidewalk over the elevator shaft consisted of two doors, each of which was approximately four feet long and twenty inches wide. Of these, the farther one was open and rose above the sidewalk to a height of about seventeen inches, and

was plainly visible to anyone passing along the sidewalk. The defendant in error upon her direct examination testified as follows:

“Before I got hurt I used to go past the place of the accident every day; used to go there frequently;—just as I got to the store I heard a call across the street and *as I looked I went down*; and after I looked I took about one step, and I went down *right away*” (Tr. pp. 167, 168).

On cross-examination she testified that when she heard the call she took one step and fell into the elevator (Tr. p. 175); that she was at the time she heard the call right on top of the elevator and almost in the hole (Tr. p. 175); that before she heard the call she was looking where she was going (Tr. p. 175); and that she was looking at the sidewalk when she heard the call (Tr. p. 175); that she looked across the street, took a step and fell into the hole (Tr. p. 175); that she knew what the hole in the sidewalk was for, loading freight (Tr. p. 175); that she had known of the elevator for about three years and knew what it was used for because she saw freight being unloaded there quite a number of times a day (Tr. pp. 176, 191, 192); that she had seen freight there very often and knew what the elevator was for (Tr. p. 178); that at the time she heard the call she was looking where she was going (Tr. p. 175). The only testimony offered by her to excuse her undoubted carelessness and even recklessness in stepping into a danger which she must have seen was that she had never before



stepped, fallen or stumbled into the hole (Tr. p. 168), and that just as she was on top of the grating and was about to step into the shaft her attention was diverted and she went into it (Tr. p. 167).

It is true that the care required of a child is not measured by the care required of an adult, and that the conduct of a child is governed by the conduct reasonably to be expected of children of the same age, capacity and intelligence, and that generally the question of due care on the part of children is one to be determined as a matter of fact by the jury. It does not follow, however, that the facts may not be such as to require a ruling by the court that the child was, as a matter of law, guilty of negligence proximately contributing to her injury and barring her recovery. Such a rule is a reasonable and necessary one and has found support in the authorities.

In *Kauffman v. Machin Shirt Company*, 167 Cal. 506, such contributory negligence on the part of a child fifteen years old was held to have been established as a matter of law from the allegations of the complaint that the child had stepped from an elevator through an open door onto the premises of the defendant and within one minute thereafter returned through the same open door, believing that the elevator was still there, and stepped into the open shaft, because in the meantime the elevator had been moved by someone else. In that case the ruling was based upon the common sense view that if the child had looked before he stepped, he would

have known of the absence of the elevator, and that under the circumstances he should have looked first. Other holdings to the same effect will be found collected in a note in *L. R. A.* 1917F at pp. 199 et seq.

In the case at bar the testimony of defendant in error herself shows that she not only knew of the existence of the elevator and the grating over it, and had known of it for several years, but that at the time of the accident she was looking directly before her on the sidewalk and must, therefore, have seen the grating in its actual condition. One of the doors rose before her to a height of seventeen inches and a width of four feet, and was directly in her path and plainly visible. If she was looking before her, as she says she was, her proximity to the shaft makes it absolutely certain that she saw the farther half of the grating up, and the shaft partially open. She herself testified that she took one step after her attention was diverted, and then fell into the hole. This can only mean that she was at the very moment when her attention was diverted on the half of the grating that was not open. She knew, therefore, that she was over the elevator and if her testimony is to be believed, which certainly she herself must concede, she knew when she stood on the grating that the other half was up and the shaft exposed. Knowing this, it was her imperative duty not to step forward. The fact that she did step forward shows conclusively that she was careless and was

not paying the necessary attention to her surroundings for her own safety. It is not sufficient that she had a right to believe and assume that the sidewalk was in safe condition, because she knew, or must have known, because her senses so informed her, that the sidewalk at that particular place was not in a safe condition. She must be held to have known the consequences of proceeding toward the open shaft and her general testimony on the stand, as well as her age and experience, indicate that she should have appreciated the danger of which she must have known. Under the circumstances the only explanation which can be made of the fact that the accident happened, in the face of her knowledge of the conditions, is that the plaintiff in error was absent-minded or she was so engrossed with the conversation she heard across the street that she ceased to pay further attention to a known danger into which she voluntarily walked.

While the cases are rare where it can be said that a child is guilty of contributory negligence, as a matter of law, those cases can and do arise, and it is the contention of plaintiff in error that this one is such a case. Certainly no clearer example can be found of such utter disregard of a disclosed danger by a child of intelligence and experience as was demonstrated in the present instance.

**THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY  
UPON THE MEASURE OF CARE REQUIRED OF THE DE-  
FENDANT IN ERROR.**

The instructions given by the trial court and set forth under assignments of error numbers 15, 18 and 19, charged the jury that the defendant in error had a right to assume that the sidewalk was in a reasonably safe condition and had a right to act upon that assumption. It further charged the jury as a fact that the defendant in error had no knowledge of any defects in the sidewalk. While those instructions as to the right of the defendant in error upon the sidewalk may be accurate as abstract propositions of law, they are entirely inaccurate when applied to the evidence already referred to, which shows beyond a question that the defendant in error did have knowledge of the defects in the sidewalk, and could not, therefore, assume that it was in a reasonably safe condition. It was, of course, extremely prejudicial error to have instructed the jury that as a matter of fact the defendant in error had no knowledge of any defects, for even if such a conclusion could by any possibility be reached from the testimony of the defendant in error, herself, such a conclusion could be drawn only by the jury itself and could not be made by the trial court and given to the jury as an established fact. It follows that both as to the law here applicable and as to the evidence itself, the court's instructions were erroneous. That such a general instruction is error even though correct as



an abstract proposition was held in *Garman v. City of Waverly*, 166 Ill. App. 399, 401, in which the verdict for the plaintiff based upon a similar instruction was reversed. The instruction and the court's comment thereon are as follows:

“The jury are instructed, as a matter of law, that any person traveling upon a sidewalk of a city, which is in constant use by the public, has a right either in the day or night time, when using the same with due diligence and care, to presume, and to act on the presumption, that it is safe for ordinary travel throughout its entire width, and free from all dangerous holes or obstructions.”

“From the evidence of appellee a jury might find that she knew all about the situation of the stairway. She admits she knew it projected into the sidewalk but did not think it projected so far. Knowing the stairway was there, she could not presume it was not. The instruction quoted is correct as a general proposition where a person has no knowledge of a defect, but it is not the law where a person knows that the sidewalk is not safe. A person, knowing a sidewalk to be unsafe, has no right to presume it is safe, and act on such presumption. Concerning such an instruction it was said in *City of Spring Valley v. Gairn*, 182 Ill. 237: ‘Had there been any evidence to show that appellant was aware of the condition of the street the instruction would have been improper, and in *City of Sumner v. Scaggs*, 52 Ill. App. 551, the case was reversed because of error in giving such an instruction. The giving of abstract propositions liable to mislead a jury has invariably been condemned.”

**THE MOTION OF DEFENDANT IN ERROR FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED UPON ALL OF THE GROUNDS URGED AND UPON THE FURTHER GROUND THAT THE DAMAGES AWARDED WERE EXCESSIVE.**

The grounds for the granting of a new trial which were urged upon the argument of the motion are those hereinbefore considered at length in this brief. The affidavits filed with the motion showed, with reference to the publication of the article in the Daily Post-Herald, that the article had been read by at least one of the jurors during the conduct of the trial and was accessible to the others. Upon this ground, as well as upon all of the grounds hereinbefore urged, the motion for a new trial should have been granted. While it is true that the granting of such motion is in the discretion of the trial court, here again the situation was such that refusal to exercise such discretion by the granting of a new trial was an abuse of discretion by reason of the manifest error committed and the injustice done to the plaintiff in error in depriving it of a fair trial.

The motion was further based upon the ground that the verdict of \$7250 was excessive. It must be conceded that damages in such amount could be reasonable only if the jury had first found that the injury to defendant in error's leg was permanent, such as urged by the witness Dr. Osorio, and even if the jury had so found, the amount awarded is so large for such an injury as to make it entirely probable that the jury were influenced in fixing the

amount by their knowledge of the alleged fact, as published in the newspaper, that an insurance company was defending the case and would be the one liable for the amount of the verdict. In view of the manifest error of the trial court during the cross-examination directed to the witness Dr. Osorio, upon the question whether or not the injury would be permanent, and of the further fact that prejudicial alleged information was placed before the jury, which was otherwise inadmissible, it must be held that the plaintiff in error did not have the unbiased and dispassionate judgment of the jurors in their effort to fix the amount of damages which they considered the defendant in error should have received.

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**THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN CALLING TO THE ATTENTION OF THE JURY THE AMOUNT OF DAMAGES CLAIMED BY THE DEFENDANT IN ERROR.**

Under assignment of error No. 20 appears the instruction of the court upon the measure of damages to be considered by the jury, with the closing statement "but in no event in a sum in excess of the amount of \$11,500". It is the contention of plaintiff in error that such mention by the court to the jury in its instructions of the amount claimed by the defendant in error was highly prejudicial to the plaintiff in error in that it gave to the jury an estimate of an amount which should have remained entirely unliquidated, in order that the jury in arriving at the ultimate amount should be en-

tirely untrammelled and uninfluenced by the estimates of others, whether of parties, counsel or the court. That this right of plaintiff in error is a substantial one and that its violation is not to be lightly disregarded appears from the opinion of the Circuit Court of Appeals for the Third Circuit in *Vaughan v. Magee*, 218 Fed. 630, where the verdict of the jury in favor of the plaintiff in an action for damages was reversed upon the sole ground that counsel referred in his examination of a witness to the amount of damages claimed by the complaint, and upon the motion of defendant thereupon made for the withdrawal of a juror and the entry of a mistrial, the lower court denied the motion, though strenuously urging upon the jury its duty to disregard the statement.

The reason for the rule is most apparent in cases like the present, where the amount to be claimed by the plaintiff is in his discretion and is without bearing of any kind upon the amount of actual damages, which is itself unliquidated and can become liquidated only by the verdict of the jury. In the *Vaughan* case practically the entire opinion is concerned with the error of the lower court. The relevant portions are as follows:

“After careful consideration of the case, we are of the opinion there was a mistrial below, and the judgment must be reversed. We regret this controversy could not have ended with this trial; but the question here involved reaches beyond the present case and parties, and affects the proper trial of the large and growing number of cases for personal injuries now finding their way to federal courts.



"In the ordinary suit on a bond, note, contract or account, the amount in suit can be stated, goes in evidence, and affords the jury a money basis on which the rights of the parties can be determined. In damage cases there is no fixed sum in controversy. The amount of damages a party recovers is ascertained by the jury from evidence regularly offered and admitted by the court of such pertinent facts as will enable the jury to itself fix the money value of the injury sustained. While among those facts may, at times, be certain definite amounts in the way of medical, surgical, and nursing expenses, and other items capable of exact fixation, yet, when it comes to determining the amount of the damages to be awarded, this is the province of the jury alone, and of a jury uninfluenced by the figures or estimates of any other person as to the amount thereof. The law, therefore, permits no estimate to be given by either party to the jury, even under oath, of the money amount of such damages, and to get the same character of estimates before a jury by indirect methods is a reprehensible practice.

"Whatever may be the practice in other jurisdictions, the courts of Pennsylvania have been stern and unyielding in that regard. Wherever a court, in its charge, or counsel, in addressing a jury, have brought to a jury's notice that a plaintiff claimed a fixed sum for damages, it has been adjudged a mistrial. *Carother v. Pittsburgh Railways Co.*, 229 Pa. 560, 79 Atl. 134; *Reese v. Hershey*, 163 Pa. 253, 30 Atl. 907, 43 Am. St. Rep. 795; *Quinn v. Phila. Rapid Transit Co.*, 224 Pa. 162, 73 Atl. 319; *Dougherty v. Pittsburgh Railways Co.*, 213 Pa. 346, 62 Atl. 926; *Hollinger v. York Railway Co.*, 225 Pa. 419, 74 Atl. 344, 17 Ann. Cas. 571. The bar of the state has loyally

supported this view, and this seems a fitting case for this court to emphasize and restate, as applicable to the federal courts of this circuit, the ruling of those cases.

“We will not enter into a speculative analysis of what effect the statement, and its repetition to the jury had. It suffices to say the jury improperly had before it substantial statements of matters which were not only not in evidence but which on no principle of law could have been admitted in evidence. The possibility of the verdicts of juries being based on that which is not evidence goes to the very foundation of that fair and impartial trial for which courts exist. Whether the objectionable statements did or did not influence the jury in this particular case is not the test, for this court cannot permit any such practice to obtain even a foothold in this circuit.”

It will be further noted that the means used by the counsel for defendant in the above case to protect the defendant from the improper statement to the jury was by a motion for the withdrawal of a juror and the entry of a mistrial, which is the same procedure as was followed in the case at bar. The Circuit Court of Appeals there held, without discussion, that the motion should have been granted, and thereupon reversed the judgment and ordered a new trial.

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### Conclusion.

It is the firm and sincere conviction of the plaintiff in error that it has not in this case been accorded a fair trial. It was compelled to proceed after the

jurors were given alleged information that could not have been other than highly prejudicial to the cause of plaintiff in error; it was compelled to continue with the trial though there was every probability that the jurors believed that not the plaintiff in error but an unknown insurance company was the real defendant in the case, and that not the question of liability but the question of how much should be awarded to the defendant in error was the one actually to be decided by the jury. And following upon such a prejudicial change in the attitude which the jury should have assumed and retained throughout the trial the lower court permitted the medical witness for defendant in error and the one who had treated her, to predict permanent injury, which alone could account for substantial damages, and to support such prediction by naming eminent medical authors whose works were accessible, and in court for inspection, but which works the plaintiff in error was not permitted to exhibit to the medical witness so as to have him point out those portions of the works which would in fact substantiate his opinion. After the jury was thus undoubtedly prejudiced, and was permitted to receive unsupported testimony of permanent injury, the court proceeded erroneously to instruct the jury as to the rights of the defendant in error upon the sidewalk, in utter disregard of the actual facts testified to by the defendant in error herself, and of the inferences necessarily to be drawn therefrom. And

to increase the bias which must have been created in the minds of the jury in favor of defendant in error, the court proceeded to state to the jury the amount of damages claimed by the defendant in error and thus gave to the jury a basis upon which it could proceed to fix the damages, when in fact no such basis should have been furnished and the jury should have been permitted and compelled to fix the amount purely from the law and the evidence and without outside assistance. The plaintiff in error feels, therefore, that it has ample reason and justification for its contention that throughout the trial and at every turn it did not have a proper and full opportunity to present its defense, and that, therefore, the judgment of the court below should be reversed and a new trial ordered.

Respectfully submitted,  
SMITH, WARREN, STANLEY & VITOUSEK,  
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No. 3997

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IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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HOFFSCHLAEGER COMPANY, LIMITED,  
*Plaintiff in Error,*

VS.

MARGARET FRAGA, by Alfred Fraga, her  
guardian ad litem,  
*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR

Upon Writ of Error to the Supreme Court of  
the Territory of Hawaii.

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FILED

MAY 1 1913

F. P. HONOLULU



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### Statement of Facts.

On the 20th day of August, 1920, about 3 o'clock P. M. Margaret Fraga, defendant in error, a minor aged 13 years, was injured by falling into an elevator shaft on the public sidewalk while walking along Keawe Street in Hilo, Territory of Hawaii, in front of the premises occupied by the plaintiff in error under lease (for lease see Exhibit "A", Tr. p. 408).

For convenience the parties will hereafter be referred to by their designations in the trial court,



that is to say: the defendant in error as plaintiff, and the plaintiff in error as defendant.

The evidence shows that plaintiff was walking slowly along Keawe Street, which is a business street in Hilo; she had two small packages in her hand at the time of the accident; when she was in front of the premises of defendant her attention was attracted by a call from Dan Borden, a boy who was walking along on the other side of the street (Tr. p. 167); she looked across the street to see who was calling and as she did so she stepped into an opening in the sidewalk in front of the defendant's place of business (Tr. p. 168); she had been in the habit of going along this sidewalk prior to the time of the accident, but had never before stumbled over anything or met with any accident along this sidewalk (Tr. p. 168); the opening into which she fell was an open trap-door in the sidewalk over a sidewalk elevator which was used by defendant for the purpose of receiving and discharging merchandise into, and from, the basement of its place of business, this trap-door having been negligently left open by one of its employees who, in the course of defendant's business, was intending to move some merchandise of defendant from the basement on to the sidewalk; the elevator door, when closed, is flush with the sidewalk, and consists of two doors, opening from the middle, each of these doors being about 20 inches wide and 4 feet in length. When open, each door stands at an angle of about 75° with the sidewalk. One of the exhibits

in the case (Plaintiff's Exhibit "E") is a photograph of this particular door, when open, and shows very clearly the position of the door at the time the accident took place. At the time of the accident only one of these doors was open, and that was the door farthest from the plaintiff at the time she fell in; the depth of the opening was approximately 10 feet, and at the time of the accident the elevator was at the bottom of the shaft, and the walls of the shaft were lined with heavy stones; the plaintiff was rendered unconscious by reason of the fall (Tr. p. 168).

The evidence showed that, as a result of the fall down the elevator shaft, plaintiff's left eyelid was lacerated, and that this injury left a permanent scar (Tr. p. 170); her back was strained, and at the time of the trial 9 months later her back still pained her (Tr. p. 223); her head was contused (Tr. p. 213); her arms were abraded (Tr. p. 212); her two hips were injured (Tr. p. 212); her right foot was sprained and her right leg injured (Tr. p. 212); in addition to these injuries, however, the most serious injury which she suffered was one to her left knee, consisting of a fracture, or as otherwise called, a separation of the epiphysis from the tibia or shaft of the leg (Tr. p. 246). This widening or separation of the epiphysis from the shaft of the leg is plainly shown on Plaintiff's Exhibit "B", an X-ray photograph of her injured left knee taken on September 4, 1920, two weeks after the injury. A comparison of this photograph with an X-ray photograph (Ex-

hibit "N") of her right or uninjured knee plainly showed the separation of the epiphysis in her left knee. Exhibit "K", being an X-ray photograph of her left or injured knee taken shortly before the time of the trial, while showing some lessening of the separation of the epiphysis still disclosed a wider separation than the normal condition as shown by her right or uninjured knee.

She was immediately put to bed, where she remained three weeks, during which time she suffered pain (Tr. p. 170), after which she returned to school and was taken back and forth in an automobile and was not able to walk. This condition still obtained at the time of the trial nine months later, and at the time of the trial plaintiff's knee was still swollen and a rubber support was worn about the knee; plaintiff testified that she was unable to walk comfortably and that when she walked "it seems that the bones are going back and forth" (Tr. p. 171) and that she could not "walk comfortably" (Tr. p. 171); and that the pains in her knee felt like a "grating" when she walks, and that this is painful to her; that at the time of the trial plaintiff stated that she was able to walk around the house but that she felt pains in her legs; she went to school but it was necessary for her to travel to and from school in an automobile; that she is not able to play any games which require the use of her leg; that she was still in the charge of her doctor and was going to her doctor about twice a week;

that her leg was swollen on the day of the trial and was exhibited to the jury and that it swelled up every day. She also testified that her head was swollen and that she still suffers from pains in her back (Tr. pp. 172-173).

The testimony of Dr. Osorio, the attending physician, is to the effect that this injury to her left knee is one which is exceedingly painful and that it is one which is not easily healed and in this case that although he thought that her knee might perhaps heal between the age of 20 and 25 years, that nevertheless it was his opinion that quite probably the wound would never entirely heal and that it was quite possible that plaintiff would be permanently afflicted by reason of the accident (Tr. p. 221).

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### Points and Authorities.

#### I. NEGLIGENCE OF PLAINTIFF IN ERROR.

The defendant (plaintiff in error) does not in its brief deny its negligence.

Furthermore, according to well settled rules, where the question of negligence is one of fact and not of law, the finding of the jury on the question is not open to review by this court on a writ of error.

*Texas etc. Company v. Harvey*, 228 U. S. 319.

This case was cited and following by this court in

*Inter-Island Steam Navigation Co. v. Ward*,  
232 Fed. 809.



So too in *Herencia v. Guzman*, 219 U. S. 44, the court said, at p. 45:

“The argument on behalf of the plaintiff in error proceeds upon the assumption that this court may review the evidence as to *negligence* and as to the damages recoverable, and may reverse the judgment if the court is dissatisfied with the findings of the jury. This, however, is not the province of the court upon writ of error. As there was evidence proper for the consideration of the jury the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered. *Express Company v. Ware*, 20 Wall. 543; *New York, Lake Erie & Western Railroad Company v. Winter’s Administrator*, 143 U. S. 60, 75; *Lincoln v. Power*, 151 U. S. 436-438; *Humes v. United States*, 170 U. S. 210. Nor was any exception taken by the plaintiff in error to the instructions which the trial court gave to the jury. The only questions which are properly before us for review are as to certain rulings upon the admissibility of testimony.”

It was the duty of defendant at all times to keep the opening in the street caused by the use of the elevator properly protected in order that the public, in using the sidewalk, should not be submitted to an unnecessary risk or hazard.

The pedestrian certainly has a right to assume that an opening in a public sidewalk or street, such as the one in the case at bar, is properly guarded. One who places an obstruction in a public sidewalk or street or makes a pitfall therein, causes a public

nuisance, and is liable for injuries resulting therefrom.

The substantive law applicable to cases of this kind is well stated in *Clifford v. Dam*, 81 N. Y. 52.

In the above case, the plaintiff brought an action to recover damages for injuries sustained from falling through a coal hole in the sidewalk in front of defendant's premises. The court said:

"The public are entitled to an unobstructed passage upon the streets including the sidewalks on the side. \* \* \* It was sufficient for the plaintiff to prove that in passing along the sidewalk he was injured by this structure which was appurtenant to defendant's premises. It was not necessary to prove negligence. The action was not based upon negligence but on a wrongful act for which the defendants were responsible \* \* \*. It is quite clear that plaintiff was not bound to prove, in the first instance, anything except the existence of a hole in the sidewalk for which the defendants were responsible and that in passing along the sidewalk he fell into it."

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## II. THE QUESTION OF CONTRIBUTORY NEGLIGENCE.

Defendant in its brief (pages 60-66) contends that the evidence shows, as a *matter of law*, that plaintiff was guilty of contributory negligence, and in the same connection complains of instructions given to the jury, which are set forth under Assignments of Error Nos. 15, 18 and 19, these instructions all bearing upon the question of the degree of care required of plaintiff.

The defendant argues that because plaintiff lived in the neighborhood and knew that the elevator was in the sidewalk, that she was reckless in not seeing the unguarded open trap-door leading to the elevator; and further argues that, because the open elevator trap-door was physically visible to any one passing along the sidewalk, plaintiff was negligent because she did not actually see the open trap-door before she fell in.

The undisputed evidence shows, however, that as the plaintiff was walking along the sidewalk and approaching the elevator opening, a boy on the opposite side of the street called to her and, child-like, her attention was attracted thereby, and, while her attention was thus distracted, she fell into the hole.

It is well settled as stated above under Point I (Brief p. 5) that unless this court can hold *as a matter of law* that plaintiff was guilty of contributory negligence, the weight or sufficiency of the evidence will not be considered, since all such questions are resolved by the verdict of the jury.

A case recently decided by this court so holds, and it is very similar in its facts to the case at bar.

Thus, in *Alaska Treadwell Gold Mining Co. v. Mugford*, (1921) 270 Fed. 753, the mining company had built a clubhouse with a platform on piles in front of it, which was used as a public passageway. A young lady who was on her

way to a dance in the clubhouse fell through a hole in the passageway due to a rotten and defective plank. The evidence showed that Miss Mugford knew that the platform was in a dilapidated condition but that she did not know of the hole. The court said, at page 756:

“It is said that even though the platform was owned and maintained by the Mining Company and used as a thoroughfare, and that even if plaintiff below was rightfully there, she was guilty of *contributory negligence*. Miss Mugford testified that she knew generally that the platform *was in poor and dilapidated condition, but that she knew nothing of the hole*, and was not looking for one at the point where she stepped off the platform. It cannot be said that she was obliged to abandon the use of the walk merely because she knew in a general way that the street was generally in bad condition. Of course, she was obliged to use a care related to the dangers known to her, or of which she ought reasonably to have known; but she did not know of the *hole* at the point, and it could not be said she ought to have known of it. The court properly declined to say as a matter of law that she was culpable, and submitted the question to the jury. *Bassett v. Fish*, 75 N. Y. 303.”

Other cases very closely parallel to the one at bar, both in its facts and the law applicable thereto, and where the question of contributory negligence on the part of a girl 19 years old was considered, are:

*Barry v. Terkildsen*, 72 Cal. 254;

*McGuire v. Spence*, 91 N. Y. ~~302~~ 303.



In the case at bar plaintiff was only 13 years old and only such standard of care is required as is reasonably to be expected of a child of that age.

*Long v. Ottumwa Ry. & Light Co.*, 142 N. W. 1008 (Ia.);

*McEldon v. Drew*, 116 N. W. 147 (Ia.);

*29 Cyc.*, p. 642.

The case of *Kauffman v. Machin Shirt Company*, 167 Cal. 506, (cited by defendant in his brief at p. 62) holds nothing contrary to what is contended for by plaintiff. In that case a boy 15 years old was employed in a building where the elevator was operated personally by the different tenants of the building. The boy used the elevator to go to one of the other floors to deliver a package and on leaving the elevator left the door open. On returning in a minute or so to the elevator he stepped through the open gate which he had left open and fell down the elevator shaft, the elevator in the meantime having been moved away by someone else. The court held that he was guilty of contributory negligence, saying that if he was able to run the elevator it would be absurd to say that a lad of 15 years was ignorant of the necessity of exercising ordinary caution in entering the elevator.

We do not deem it necessary to present further argument upon this point. The jury having found a verdict for plaintiff under instructions which stated the law more favorably for defendant than it was entitled under the law in cases similar, it cannot

be successfully argued that plaintiff failed to establish a *prima facie* case.

The instructions given by the court on the subject of the degree of care required of plaintiff (Assignments of Error, Nos. 15, 18 and 19), were in full accord with the authorities cited above.

The case of *Garman v. City of Waverly*, 166 Ill. App. 399, (cited by defendant in its brief at page 66) holds that the instructions given by the court in that case, while technically correct as an abstract principle of law, are nevertheless erroneous because the uncontradicted evidence showed that plaintiff knew of the existence of the open stairway down which she fell, this stairway having been for 20 years in the public square and often frequented by plaintiff. Furthermore, in that case plaintiff was an adult 52 years old. To make this Illinois case at all similar to the case at bar, we would have to assume that this elevator door was always *open* and that the plaintiff knew that this elevator door was always open and was familiar with the continuously dangerous and unguarded condition of the sidewalk at this point. The evidence of course utterly fails to show that the elevator opening was ever left unguarded except on this single occasion or that plaintiff frequently saw the elevator used.

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### III. DAMAGES.

Plaintiff's injuries were admittedly the proximate result of defendant's negligence. There was no

conflict in the testimony as to the injuries suffered by plaintiff, but only as to the extent and permanency of some of them—injury to her left knee and to her back.

The evidence affirmatively shows not only the separation of the epiphysis of the left knee which the attending physician Dr. Osorio testified would probably never entirely heal and that plaintiff would quite possibly be permanently afflicted by reason of the accident, but also the other injuries in addition which are described in Plaintiff's Opening Statement herein.

Dr. Osorio, the attending physician, testified that in his opinion her knee would quite probably never entirely heal and that it was quite possible that the plaintiff would be permanently afflicted by reason of the accident (Tr. p. 221). Dr. Sexton, a physician called by defendant, testified on the other hand that in his opinion the injury would not be permanent. The whole question was thus one of the extent and permanency of the injury under the evidence and this question was of course left to the jury to decide.

In actions for personal injuries, the law does not attempt to fix any precise rule for the measure of damages, but leaves their assessment to the discretion of the jury. No method has yet been devised by which to measure and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be. Considering the injuries to

plaintiff, which were proven to have been suffered by her, it cannot be said that the jury were actuated by bias, prejudice or improper motives.

In *Alau v. Everett* (1887), 7 Haw. 82, the court said:

“In actions for personal torts, the law does not attempt to fix any precise rule for the admeasurement of damages, but from the necessity of the case leaves their assessment to the good sense and unbiased judgment of the jury. Their verdict, as in all other cases, is subject to review by the Court, but it will never be disturbed unless the damage is so obviously disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury.”

The same principle and rule as to the assessment of damages has been laid down by the Supreme Court of the United States. Thus, in

*The Steamship City of Panama v. Phelps*,  
101 U. S. 454 (1880),

the plaintiff fell down a concealed hatchway in the floor of the cabin near her stateroom which had been left uncovered by some of the employees of the steamship company. The Supreme Court of the Territory of Washington entered a decree in favor of the plaintiff in the sum of \$15,000. The Supreme Court of the United States, in affirming the decree, said:

“When the suit is brought by the party for personal injuries, *there cannot be any fixed*



*measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."*

This is also the rule laid down by the Circuit Court of Appeals of this Circuit (Ninth Circuit).

*Western Union Telegraph Company v. Engler* (1896), 75 Fed. 102;

*Southern Pacific Company v. Raugh* (1892), 49 Fed. 696.

The defendant in its brief (pp. 67-68) contends that the award of damages of \$7250 was excessive.

It is well settled, however, that this court on a writ of error to a territorial court cannot consider this question. Thus, in

*Phoenix Railroad Co. v. Landis* (1913), 231 U. S. 578, the court said:

"The argument in substance is that the verdict was without sufficient basis in the evidence. It cannot be said, however, that there was no evidence to go to the jury and as we are limited to those questions which may be properly raised on writ of error; an objection that the verdict is against the weight of evidence or that the damages allowed were excessive cannot be considered in this court" (Citing cases).

To the same effect are

*St. Louis etc. Railroad Co. v. Craft* (1915), 237 U. S. 648;

*Herencia v. Guzman*, 219 U. S. 44;  
*Wilson v. Everett* (1890), 139 U. S. 616, 621;  
*Erie Railroad Co. v. Winter* (1891), 143 U.  
 S. 60, 75;  
*Lincoln v. Power* (1893), 151 U. S. 436, 437.

The same rule has of course been announced by this court. Thus, in *Alaska Packers Association v. Gover* (1922), 278 Fed. 927, this court said, at page 929:

“It is assigned as error that the court below overruled the defendant’s motion to set aside the verdict and grant a new trial, and it is urged in the defendant’s briefs that the amount of the verdict is grossly *excessive*. But it is so well settled as to require no citation of authorities that in a federal appellate court the ruling of a trial court on a motion for a new trial is not assignable as error. Nor can the question of the amount of damages assessed by a jury be re-examined in an appellate court. *Phoenix Ry. Co. v. Landis*, 231 U. S. 581, 34 Sup. Ct. 179, 58 L. Ed. 377; *St. Louis & Iron M. T. Ry. Co. v. Craft*, 237 U. S. 661, 35 Sup. Ct. 704, 59 L. Ed. 1160; *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224.”

See also the *American Trading Company v. Steele* (1921), 274 Fed. 774,—also a decision of this court.

For completeness of argument, the following cases are cited, where substantial verdicts for personal injuries have been upheld, there being a more or

less close analogy of the facts in the cases cited with those of the case at bar:

*Dolan v. Sierra Railway Co.* (1902), 135 Cal. 435, (where a verdict of \$7000 was upheld, where plaintiff was injured about the head, and there was evidence tending to show that his injuries were permanent);

*Wheeler v. Chicago, etc. Railroad Co.* (1913), 182 Ill. App. 194, (where a verdict of \$15,000 for injuries resulting from the plaintiff's fractured kneecap, resulting in a stiffness of the joint, was upheld);

*Galveston, etc. Railway Co. v. Stoy* (1907), 99 S. W. 135 (Tex.), (where a verdict for \$8000 for injuries to a railway switchman's knee, preventing him from performing the labor which he was employed to perform, and causing a shock to his nervous condition, was upheld);

*Galveston, etc. Railway Co. v. Cade* (1906), 93 S. W. 124 (Tex.), (where a verdict for \$9300 on account of injuries to the knee of a locomotive fireman, causing a locked joint and a condition rendering him incapable of doing heavy labor, was upheld).

It should, furthermore, be expressly noticed that the cases cited above on the question of the excessiveness of the verdict, where substantial damages were allowed by the jury, were all decided prior to the year 1914, when the purchasing power of a dollar was very much greater than was the purchasing power of a dollar in the year 1921, when the verdict

in the case at bar was rendered. The courts have taken judicial cognizance of this fact as have also legal textbook writers.

Thus, in Volume 4 of *Sutherland on Damages*, 4th Ed., Section 1256, it is said:

“The tendency in recent years has been for juries to award and courts to sustain increasingly larger sums as compensation for personal injuries. ‘This is attributable, no doubt, to the greatly decreased purchasing power of a dollar, as exemplified in the rise of the price of nearly all commodities, and the enormous increase in the cost of living; and, in some measure, perhaps, to a higher regard for human life and the value of physical efficiency.’ (Quoting from *Louisville & N. R. Co. v. Williams*, 183 Ala. 138)”.

The lessened value of the dollar was adverted to in the following cases:

*Hayes v. United Rys. Co.*, 183 Mo. App. 608  
(decided in 1914);

*Duffey v. Kansas City Railway Co.* (1920),  
217 S. W. 883 (Mo.),

(the court upheld a verdict for \$5000 for injuries to a captain in the fire department of the city, in which his knee was injured, putting him to pain and impairing his agility).

*Delhery v. Quinlan* (1918), 210 Ill. App. 321;

*Noyes v. Des Moines Club* (1919), 170 N. W.  
461 (Ia.), (sustaining a verdict for \$8000).



### Reply to Brief of Plaintiff in Error.

The first point advanced by plaintiff in error (defendant) is that the trial court erred in denying its motion for withdrawal of a juror.

This motion was occasioned by reason of the publication of a certain article in a local newspaper called "The Daily Post-Herald", the text of which is set forth in the transcript at pages 92 to 93, and which defendant claims was prejudicial to it.

Before discussing the merits of this objection of defendant to the denial of its motion to withdraw a juror, it should be noted at the outset that when the motion was made on May 25, 1921, it was based solely upon the affidavit of W. L. Stanley, the defendant's attorney, who was trying the case for defendant (Tr. pp. 48-52). This affidavit showed no more than the publication of the article and that James W. Russell was a stockholder of the publishing company; and Mr. Stanley stated his own conclusion that the article was prejudicial to defendant's rights.

A reply affidavit was filed by Mr. J. W. Russell (Tr. pp. 53-54) to the effect that he knew nothing whatever about the publication of the article before it was published and that he had nothing to do with the management or editorial policy of the paper, but only with its financial policy. A reply affidavit was also filed by Mr. Harold Russell (Tr. pp. 54-57), who was the reporter who wrote up the article, and who, though of the same name, was not related to

Mr. J. W. Russell. Mr. Harold Russell stated that all the information contained in the article had been gathered by him from two interviews with Mr. Meinke, the Hilo manager of defendant, and had been furnished him by said manager to be published in "The Daily Post-Herald" as a news article; he also stated that neither of plaintiff's attorneys knew in advance that the article was to be published.

Counter-affidavits were filed by both Mr. Stanley and by Mr. Meinke; Mr. Stanley (Tr. pp. 57-60) making denials of some of the allegations contained in the newspaper articles, and Mr. Meinke (Tr. pp. 60-63) giving his version of his interviews with Mr. Russell, the reporter.

This was the only record before the trial court when the motion to withdraw a juror was made and denied. The trial court (Judge Thompson) after holding that a motion to withdraw a juror did not lie under the practice of the Territory of Hawaii, went on and found the facts to be as stated by plaintiff in the reply affidavits of Mr. J. W. Russell and of Mr. Harold Russell, the reporter, and against the affidavits of Mr. Stanley and Mr. Meinke on behalf of defendant (Tr. pp. 64-66). Subsequently, on defendant's motion for a new trial (Tr. pp. 70 et seq.) defendant asked for a new trial, amongst other grounds, upon the ground of newly discovered evidence bearing upon the publication of the same newspaper article; certain affidavits containing this additional evidence were attached to, and made a part of, defendant's motion for a new trial

(Tr. pp. 74-83). In one of the supplemental affidavits of E. A. Namohala (Tr. p. 81), one of the jurors who tried the case, Mr. Namohala stated that on the afternoon of May 24, 1921, the first day of the trial, he saw and read the article in question. No affidavits from any of the other jurors were furnished, and it is fair to presume, therefore, that none of the other jurors saw or read the article. There were also other counter-affidavits relating to the circumstances under which the article was published, but it is not material to this part of our discussion to consider them here.

The trial Judge (Judge Ross), who passed upon defendant's motion for a new trial, denied the motion and in doing so, said:

"I am unable to say that the published article was of such a nature, or contained statements which were of a prejudicial character, and gave effect or weight to any evidence and that the jury was in any manner influenced by the said article, even though one of the jurors read it. Particular stress by the defendant is placed on that portion of the article which states that an *insurance* company is defending the case for the defendant, and that the insurance company at the time of the accident agreed to settle for a small amount of damages. Newspapers should be very careful as to what they publish during a trial, and in my opinion the above statements should not have been published while the trial was going on, yet if the law permitted a new trial for everything a newspaper might publish, that is everything and anything that a party might conceive to be prejudicial, the courts would be busy granting new trials, or a statute would have to be en-

acted prohibiting the press from making any comment whatever on proceedings in court. I cannot see where the article as published is so prejudicial as to justify, require or permit the withdrawal of a juror under the motion, or now, on that ground to grant a new trial" (Tr. p. 94).

In other words, neither the affidavit of Mr. Noma-hala, the juror, who said he saw and read the article, nor any of the other supplemental affidavits used on the motion for a new trial, were before Judge Thompson, who tried the case, when in the course of the trial he denied defendant's motion to withdraw a juror.

Assuming for the time being that the ruling on the motion by Judge Thompson in the course of the trial may be reviewed in this court, it is respectfully submitted that the ruling of Judge Ross, denying a new trial on any of the grounds upon which the motion of defendant for a new trial was based, cannot be reviewed in this court on writ of error.

Thus, this court in *Alaska Packers Association v. Gover*, 278 Fed. 927, said, at page 929:

"It is assigned as error that the court below overruled the defendant's motion to set aside the verdict and grant a new trial, and it is urged in the defendant's briefs that the amount of the verdict is grossly *excessive*. But it is so well settled as to require no citation of authorities that in a federal appellate court the *ruling of a trial court on a motion for a new trial is not assignable as error*. Nor can the question of the amount of damages assessed by a jury



be re-examined in an appellate court. *Phoenix Ry. Co. v. Landis*, 231 U. S. 581, 34 Sup. Ct. 179, 58 L. Ed. 377; *St. Louis & Iron M. T. Ry. Co. v. Craft*, 237 U. S. 661, 35 Sup. Ct. 704, 59 L. Ed. 1160; *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224."

In *Erie Railroad Co. v. Winter*, 183 U. S. 60, at page 75, the court said:

"Whether the verdict was excessive, is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for *a new trial, the granting or refusal of which is not assignable for error here*. As stated by us in *Aetna Life Ins. Co. v. Ward*: 'It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. *In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusals to charge*. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.' 140 U. S. 91, citing numerous cases."

In *Lincoln v. Power*, 151 U. S. 436, at p. 439, the court said:

"If, then, no errors were committed by the court below in the admission or exclusion of evidence or in its charge to the jury, the verdict and judgment must be permitted to stand. Such errors are, however, assigned and will now receive our attention."

Since, therefore, the denial by the trial court of defendant's motion for a new trial may not be reviewed in this court, it is only the ruling of the trial court (Judge Thompson) in the course of the trial which may be here reviewed, and the ruling must of course be reviewed on the same record which was before Judge Thompson.

This record, as we have seen, did not show or purport to show that this newspaper article was seen or read by any juror in the case.

Defendant, however, has asked that the court's order denying a new trial be held erroneous because defendant's motion to withdraw a juror was denied. Defendant in its brief (p. 67) says:

“The motion of defendant in error for a new trial should have been granted upon all of the grounds urged,” etc.

On defendant's assumption that the court's ruling on the motion for a new trial may be reviewed it has assumed that the juror's affidavit to the effect that he had seen and read the article was part of the record for consideration by this court. Following this assumption, defendant has cited two groups of cases; first (pp. 17-26) cases dealing with the improper offer of evidence or improper statements in court in the presence of the jury; and second (pp. 27-37) cases where prejudicial articles in newspapers have actually been read by the jury in the course

of the trial. Thus defendant, in its brief at page 35, says:

“A motion for the withdrawal of a juror and entry of a mistrial is a proper motion when inadmissible evidence has been placed before the jury.”

So much for the record in the case and defendant's misconceived theory that this court may review the ruling of the lower court denying defendant's motion for a new trial.

Coming now to the merits of defendant's objection, in the first place, it is very doubtful whether such a motion—a motion to withdraw a juror—lies under the practice of the Territory of Hawaii, or for that matter, in any of the States or Territories within the Ninth Circuit of the United States.

Counsel for defendant, in the trial court, admitted that during their practice in the Territory of Hawaii they had never known of a motion of this character having been presented to a court, and that the question had never been presented to the Supreme Court of the Territory of Hawaii (Tr. p. 91). The trial judge (Judge Thompson), in passing on the motion at the trial, held that no such motion lay under the local practice in the Territory of Hawaii (Tr. pp. 64-65).

The Supreme Court of the Territory of Hawaii did not pass upon the question in the case at bar as to whether or not such a motion lay under the

practice of the Territory, but upheld the ruling of the trial court on other grounds (Tr. p. 360).

In *Usborne v. Stevenson* (1892), 58 Pac. 1103 (Ore.); s. c. 48 L. R. A. 432, Judge Bean, speaking for the Supreme Court of Oregon, held that the motion did not lie under the practice of Oregon. The practice in Oregon in this respect is similar to that in all the Pacific Coast States.

In the case-note in 48 L. R. A. 432, there is a full review of the cases dealing with this motion.

Defendant in its brief (p. 36) cites four cases in support of the practice of allowing such motion, but two of these are New York cases, where the practice seems to have originated, and the two Federal cases cited are by the Circuit Court of Appeals of the Third Circuit, dealing with the practice in the State of Pennsylvania.

Inasmuch as the Code States of the Ninth Circuit have full and adequate statutes relating to continuance of a trial in case of surprise, and a party can at any stage of the trial ask for re-examination of any particular juror, or of all of the jurors, if occasion arises requiring such a course to be pursued, it seems very doubtful whether such a motion—to withdraw a juror—lies under the practice in the Territory of Hawaii or elsewhere in the Ninth Circuit. At any rate, the industry of counsel for defendant has been unable to cite any case from the Territory of Hawaii, or any case decided by the Circuit Court of Appeals of the Ninth Circuit where such a motion was ever employed or allowed.



And it would seem doubtful if this court will give its sanction to this practice which, as Judge Bean says, was based on a fiction, because of the old theory laid down in some of the ancient cases that this was the only method by which the rights of a party might be protected in case of surprise. The liberal procedure and practice in modern times, and specially in the Code States, makes the reason of the rule disappear, hence the rule itself fails of its foundation. Just as long established practice makes the law of practice of a jurisdiction, so the entire absence of a practice contended for after the lapse of a long period of years in any jurisdiction, likewise tends to negative the existence of the rule of practice contended for.

If defendant thought that it was prejudice by the newspaper article in question, it should, as suggested by the Supreme Court of Hawaii (Tr. p. 357), have appealed to the trial court for leave to examine any particular juror, or all of the jurors, as on the *voir dire*. If this same article had been published the day before the jury was impanelled, the mere previous reading of this article would not have disqualified these same men from acting as jurors in the case. If they had answered, either that they had not read the article, or that having read it, they could disregard the statements therein contained and weigh the evidence impartially, they would have successfully passed any challenge which either counsel could have made upon that ground. But counsel for defendant evidently did not wish to try out the ques-

tion on the merits as to whether any of the jurors had seen the article, or whether, having seen it, any of them were prejudiced thereby. No, defendant makes a technical objection, based on an abstract theory that the jury had seen the article and were prejudiced and asks that a mistrial be ordered. Why did not defendant, as suggested by the Supreme Court of Hawaii (Tr. pp. 358-359), ask to have the jurors re-examined so as to determine whether or not they had read the article, or what effect, if any, it had upon them. Had they been examined and the trial judge had been satisfied that they could weigh the evidence impartially, this motion would have been denied as a matter of course.

In *Marrin v. United States*, 167 U. S. 951 (Circuit Court of Appeals, Third Circuit), the court held:

“While the fact that jurors engaged in the trial of a criminal case have read newspaper articles relating to the case which were highly improper and calculated to prejudice the defendant, will justify the Court in its discretion in permitting the withdrawal of a juror and the continuance of the case, *it is not an abuse of discretion to refuse to do so, where such jurors upon being interrogated admit that the articles read would not influence them in arriving at the verdict.*”

So, too, in *Hollenbach v. McCord*, 132 S. W. <sup>Mo.</sup> (Kansas) 1189, the court held:

“In an action for injuries \* \* \* a newspaper published an account of the proceedings, whereupon defendant moved to discharge the jury because of such publication. Held that

such publication did not constitute ground for discharging the jury or the granting of a new trial *in the absence of proof that the jury as sworn were unduly influenced by the publication to defendant's prejudice.*"

So, too, in *State v. Hoffman*, 45 So. (La.) 951, the court held:

"Though the jury have been allowed to separate the publication of comments upon the case by a local newspaper during the trial will not be ground for discharging the jury in the absence of proof *that the jurors or some of them actually read the comments and were so impressed thereby as to be disqualified from further service on the jury.*"

Suppose the court had granted the motion of defendant and ordered a new jury impanelled for the next day, upon which the article in question was published. Would defendant have been any better off with respect to the jury than if defendant had been afforded the opportunity of re-examining the same jury which was already in the jury box?

Should defendant be allowed to make a mere technical motion to withdraw a juror, irrespective of a showing of actual prejudice, and that one or more of the jurors read the article, with the possible hope and expectation that his motion will be denied and thus take his chances with the jury as to a favorable verdict and urge his technical point on appeal as a ground of reversal? The Supreme Court of the Territory of Hawaii, in sustaining the judgment in the case at bar, said that it was incum-

bent upon defendant, in conformity with correct and well recognized procedure, to have asked:

“at the opening of the second day’s session of the court that the trial be suspended and the jurors re-examined in order to ascertain how many, if any, of them had read the article in question, how many, if any, had received from the article impressions as to the merits of the case on trial and how many, if any, were not able to sit with unprejudiced minds in the further trial of the case” (Tr. p. 35).

The Supreme Court also said that:

*“it would not do to permit a party to take the chance of a favorable verdict and failing in that to claim the existence of prejudice of jurors which he failed to show when he had the opportunity”* (Tr. p. 359).

We thus find that defendant made a motion which probably does not lie under the practice of the Territory of Hawaii or of the Ninth Circuit, and we find him employing a motion based on an abstract assumption of fact that the jurors or some of them did in fact read the article, and that they were in fact prejudiced against defendant by reason thereof; whereas, defendant had the opportunity of having one or more of the jurors examined to determine whether as an actual fact any of the jurors had read the article and if so, what effect, if any, the article had on their minds.

However, assuming for the sake of argument that defendant was within his legal rights to make the



motion to withdraw a juror, was error committed by the trial court in denying the motion?

The trial court found that Karl J. Meinke, the resident manager of defendant, had given the reporter the information which was set out in the article and found that if any injury was done it was brought about by defendant's own acts. The court further found that in its belief the right of no one was prejudiced or jeopardized by the article in question (Tr. p. 66).

While it is true that Mr. J. W. Russell, the president of the Daily Post-Herald, was a partner of Mr. Patterson who tried the case at bar for the plaintiff, Mr. J. W. Russell made an affidavit that he was concerned only with the financial policy of the paper and not at all with the administrative affairs of the company, and that he had no knowledge whatsoever, prior to the publication of the article, that anything would be published about the case. The denial of defendant's motion implies that the trial court found in accordance with Mr. Russell's affidavit. The trial judge was Judge Thompson. The motion for a new trial was heard and decided by Judge Ross, who held that the article was not so prejudicial as to justify the granting of a new trial (Tr. p. 94).

Furthermore, to grant a motion to withdraw a juror is a matter resting in the sound discretion of the trial court. *It is not a right and has been said*

*by many courts to be a favor.* All the authorities agree that it is a matter resting in the sound discretion of the trial court.

The following authorities support the above statement of the law that the granting or refusing of the motion lies in the discretion of the court:

*Glendenning v. Canary*, 5 Daly (N. Y.) 489, 48 L. R. A. 432;

*Bradley v. D. E. Cleary Co.*, 86 N. J. L. 338, 90 Atl. 1015;

*Cattano v. Metropolitan Street Railroad Co.*, 173 N. Y. 365, 572, 66 N. E. 563, 565;

*Cheesebrough v. Conover*, 140 N. Y. 382, 388, 35 N. E. 633, 635;

*Heiler v. Goodman's Motor Expressvan & Storage Co.*, 105 Atl. 233, (N. J.) 191.

Furthermore, it is submitted that on writ of error this court will not review the ruling on defendant's motion, since the motion deals with the question of local practice in the courts of the Territory of Hawaii.

Thus, in *Tevie v. Ryan* (1913), 233 U. S. 273, on writ of error to the Supreme Court of the Territory of Arizona, the court said:

“We are not disposed to lightly disturb the decision of the Territorial Supreme Court, turning so largely, as it does, upon the local practice.”

In *Sanford v. Ainsa*, (1912) 228 U. S. 705, the court said:

“We rarely disturb local decisions on questions of local practice, and we see no reason to do so in this instance.”

*Herbert v. Bicknell* (1914), 233 U. S. 70;

*Kalamianaole v. Smithies*, (1913) 226 U. S. 462.

A large number of cases are cited by defendant in its brief for the proposition that evidence is inadmissible to the effect that defendant is insured against (defendant's brief, pp. 17-18); or that an offer of compromise has been made (defendant's brief, pp. 20-26).

Each and all of these cases cited by defendant are cases where the evidence was offered or admitted, or statements made, in court before a jury. In the cases cited, the jury actually heard the evidence or the statements; they were made by counsel in the ordinary course of the trial. And these cases being applicable only to cases where improper evidence was actually brought to the attention of the jury in the court-room during the progress of the trial, they have little or no relevancy upon the question at issue in the case at bar, and no useful purpose would be served by a separate and detailed consideration of each individual case cited. As said by the Supreme Court of the Territory of Hawaii (Tr. pp. 359-360):

“There is a difference worthy of mention between evidence, offers of evidence and argument

adduced in court, on the one hand, and newspaper publications out of court, on the other hand. The latter, it may well be presumed, would not have the same effect upon a jury as the former. *Hollenbach v. McCord*, 132 S. W. (Mo.) 1189, 1190, 1191. Nor was there any evidence in the case at bar tending to show that the plaintiff or her attorneys or anyone else in her behalf caused the publication in question to be made. The only evidence on the subject is to the effect that the plaintiff's attorney did not cause the publication and the trial judge so found as a fact."

The cases cited by defendant represent the extreme view of the courts of some of the states. The courts of many other states, however, hold that even where improper evidence is offered or improper remarks made by counsel or others in the presence of a jury, the remarks of the judge to the jury that they should disregard the improper evidence or statements cures the objection taken by opposing counsel.

For example, in *Bradley v. D. E. Cleary Co.* (1914), 90 Atl. 1015 (N. J.), the court held:

"Under the conditions existing at the trial of this case the trial judge properly refused to order a mistrial upon the alleged ground that defendant's rights had been prejudiced before the jury in that plaintiff had illegally injected into the evidence, as if it had been proved, *the fact that defendant had been insured against loss through accident*; the granting of such order under the circumstances rested in his discretion and his refusal was not assignable error."



In *Holt v. Oval Oak Mfg. Co.* (1919), 98 S. E. (N. C.) 369, the court held:

“In action for injuries to an employee where employer’s counsel made improper allusions to insurance company indemnifying the employer, the court by immediately cautioning the jury as to the only issues, removed the prejudice that such allusions were calculated to produce.”

In *Williamson v. Hardy* (1920), 47 Cal. App. 377, 190 Pac. 646, the court held:

“On its appeal from the judgment in favor of the plaintiff in an action for damages for personal injuries, the record did not support the contention of appellant that counsel were guilty of misconduct in seeking to bring before the jury the fact that the action was being defended by a surety company which, though not a party to the action, was the insurer of appellant against claims for damages, the only time counsel for plaintiff referred to that fact the court having instructed the jury to disregard the remarks of counsel for plaintiff in that respect.”

See also to the same effect the following cases:

*Muehlebach v. Muehlebach Brewing Company*  
(1922), 242 S. W. 174 (Mo.);

*Stafford v. Noble* (1919), 182 Pac. 650  
(Kansas);

*St. Louis etc. Co. v. Nowland* (1919), 215 S.  
W. 11;

*Coral etc. Company v. Collins* (1918), 205 S.  
W. (Ky.) 958;

*U. S. v. Reid*, 12 How. 361; s. c. 13 Law Ed.  
1023.

The Supreme Court of Hawaii, in passing upon this question in the case at bar, said:

“It is true that in many cases in New York, Illinois and perhaps other states it has been held that the mere statement, direct or indirect, by counsel to or in the presence of the jury that the defendant is protected by accident insurance is reversible error. This is an extreme view and does not appeal to us as sound. We do not care to follow it. We think that with a possible occasional exception due to particular circumstances ordinary cautionary instructions would cure what otherwise might be error. There are other cases, of course, which hold that cautionary instructions do cure. See for example, *Holt v. Manufacturing Co.*, 98 S. E. (N. C.) 369, 370, 371.”

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#### THE INSTRUCTION AS TO DAMAGES.

Another point argued by plaintiff in error is that the trial court erred in giving the instruction as to damages because the court added the words “but in no event in a sum in excess of the amount of \$11,500”.

On pages 68 to 71 of its brief, defendant claims that there was error in the instruction of the court (Assignment of Error No. 20) on the subject matter of damages because the court ended its instruction with the words “but in no event in a sum in excess of the amount of \$11,500” (Tr. p. 384).

Defendant in its brief (p. 68) states that the court mentioned in its instruction “the amount claimed by the defendant in error” in her complaint. A refer-

ence to the instruction discloses, however, that no reference was made by the court that the sum of \$11,500 "was claimed by plaintiff in her complaint". We do not believe that it would have been erroneous if the court had added after the instruction as given a statement that said sum was the amount claimed by plaintiff in her complaint. The fact is, however, the court did not refer to the \$11,500 as being the amount claimed by plaintiff in her complaint.

The case of *Vaughan v. McGee*, 218 Fed. 630 (decided by the Circuit Court of Appeals of the Third Circuit), which is cited by counsel for defendant on p. 69 of its brief, held that under the Pennsylvania practice a reference by counsel for plaintiff to the amount of damages claimed by plaintiff in his complaint was error. Even if this extreme rule were good law generally it would have no application to the case at bar for neither the court nor counsel made any reference to the amount of damages claimed by plaintiff in her complaint.

In 1 *Randall "Instructions to Juries"*, Sec. 351, it is said:

"While there are decisions that it is not good practice to mention the ad damnum in the instructions, the general rule is that an instruction referring to the amount sued for, or limiting the right of recovery to the amount claimed in the declaration, is not error, unless the instruction is so worded as to suggest giving the amount so claimed." (Citing cases from many jurisdictions to the effect that reference to the ad damnum clause of the complaint is not error.)

In California and many other states, and in the Ninth Circuit of this court, instructions have been upheld which contained a reference to the damages claimed by the plaintiff in his complaint.

*Swensen v. Bender*, 114 Fed. 1, (decided by the Circuit Court of Appeals for the Ninth Circuit.);

*Learned v. Transit Company*, 193 Pac. (Cal.) 591;

*Ryan v. Oakland, etc. Co.*, 21 Cal. App. 14;

*Denver, etc. Co. v. Owens*, 36 Pac. (Colo.) 848;

*Sherwood v. Chicago, etc. Railway Co.*, 46 N. W. (Mich.) 773;

*Chicago, etc. Railway Co. v. Penix*, 159 Pac. (Okl.) 1141;

*Mackay v. Commission*, 152 Pac. (Ore.) 250;

*Gulf, etc. Railway Co. v. Brown*, 40 S. W. (Tex.) 608;

*Picino v. Utah-Apex Mining Co.*, 173 Pac. (Utah) 900;

*City of Charlottesville v. Jones*, 97 S. E. (Va.) 316.

Instructions similar to the one in the case at bar, where the court used the words “not exceeding \$.....” have been upheld in the following cases:

*Reitz v. Hodgkins*, 112 N. E. (Ind.) 386;

*Chesapeake, etc. Co. v. Bland*, 188 S. W. (Ky.) 498;

*City of Charlottesville v. Jones*, 97 S. E. (Va.) 316;



*City v. Bradbury*, 25 Pac. (Kan.) 889;  
*Sherwood v. Chicago, etc. Railway Co.*, 46  
 N. W. (Mich.) 773;  
*Bamber v. United Railways Co.*, 192 S. W.  
 (Mo.) 953;  
*Rogan v. Montana, etc. Railway Co.*, 52 Pac.  
 (Mont.) 206;  
*Bower v. Chicago etc. Company*, 148 N. W.  
 (Neb.) 145;  
*Chicago, etc. Railway Co. v. Penix*, 159 Pac.  
 (Okl.) 1141.

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#### THE RULING AS TO MEDICAL TREATISES.

Another point argued by plaintiff in error (defendant) is that the court erred in refusing to order Doctor Osorio, a witness for the plaintiff, to produce certain medical books for examination by defendant's counsel (defendant's brief, pp. 51-60) (Assignments of Error Nos. 6, 12 and 13).

Assignment of Error No. 6 is based on the transactions occurring at the trial, as set forth in the Transcript at pp. 248-9; also at pp. 265-6.

Assignment of Error No. 12 is based upon the transactions occurring at the trial, as set forth in the Transcript at pp. 284-5.

Assignment of Error No. 13 is but a repetition of the points covered by Assignments Nos. 6 and 12.

Assignment of Error No. 4, although casually referred to in defendant's brief at p. 51, is not relied upon by defendant, since defendant in its brief

(p. 51) expressly enumerates the errors relied upon and does not mention Error No. 4, and in fact defendant does not seriously rely on this error as shown by defendant's brief at p. 51.

Assignments Nos. 6, and 12 are discussed together by defendant and they will likewise be considered by plaintiff as they raise substantially the same point.

It can readily be ascertained from the transcript that plaintiff's counsel did not elicit from Dr. Osorio the citation of a single medical authority upon his direct examination. This is of course conceded by defendant.

Many cases hold that where a medical expert in his direct examination does not refer to medical books, it is improper for opposing counsel to refer to medical books at all in connection with the witness' examination.

*Allen v. Boston Elevated Ry. Co.*, 98 N. E. (Mass.) 618.

Where the expert in his direct examination has expressly named a medical authority, on cross examination, opposing counsel may call to the witness' attention statements in the treatises mentioned, in order to qualify or impeach the witness' statements as to the contents of said treatises.

*Union Pacific Railroad Company v. Yates*,  
79 Fed. 584 (Circuit Court of Appeals  
Eighth Circuit);

*Eggart v. State*, 25 So. (Fla.) 144-147;

*Gallagher v. Market Street Railway Company*  
67 Cal. 13, 17.

Dr. Osorio did not even volunteer the name of any medical authority on his cross examination. The names of the treatises mentioned in the cross examination were each and all solicited by defendant's attorney in answer to defendant's attorney's questions whether the doctor could cite any authority to substantiate his opinion.

It will be ascertained from the transcript that defendant's counsel did not call to Dr. Osorio's attention any particular statement contained in any of the medical authorities mentioned, but merely asked the doctor in the case of Keene's book "will you see if you can find anything"—in support of his opinion, (Tr. p. 284); and defendant's counsel asked the court to require the witness to produce the other medical books mentioned by the doctor in order "to have him read the extracts from these books", etc. (Tr. p. 249).

The most liberal rule which is announced in the cases is that where a medical expert has expressed his opinion without referring in his direct examination to any such treatises, on cross examination opposing counsel may *read to the witness, or call to the attention of the witness*, certain statements in the treatises bearing on the question at issue which are *not in harmony with the witness' testimony*, for the purpose of impeaching the witness or testing the expert's knowledge.

*Victoria American, etc. Co. v. Tomljanovich*,  
232 Fed. 662 (Circuit Court of Appeals  
Eighth Circuit);

*Ganz v. Metropolitan Railroad Co.*, 220 S. W. (Mo.) 490;

*Griffith v. Los Angeles Pacific Railroad Company*, 14 Cal. App. 145.

In the California case last cited, the physician had expressed his opinion that plaintiff had sustained an injury which was of a permanent character. Upon cross examination, he was asked whether he had read any books on the subject, to which he replied that he had read "Dana". Opposing counsel then asked the witness "Doesn't Dana state \* \* that paralysis of spinal origin must exist on both sides?" The witness had already expressed his opinion to the effect that paralysis of spinal origin did not exist on one side only. The trial court sustained the objection. On appeal, the appellate court, while holding that the trial court committed a technical error in sustaining the objection to the question, held that the ruling was without prejudicial error because counsel's question did not seek to elicit anything different from that to which the witness had testified. The court in discussing the principle said:

"The rule affecting the examination of an expert medical witness, which permits a showing of the contents of the books of standard authors skilled in that particular profession, is limited. It is permissible only to show what such authors have declared upon a subject, when a witness has based his opinion wholly or in part upon his reading of books of that character (*Fisher v. Southern Pacific R. Co.*, 89 Cal. 400, (26 Pac. 894); *Lilley v. Parkinson*, 91 Cal. 655, (27 Pac.



1091) ), and then only when statements found in such books *are not in harmony with the testimony of the witness. Here the physician expressly declared that he had neither heard nor read of a case where there was spinal injury with resulting paralysis of one side of the body only.*"

It should be noted that in the California case above named defendant's counsel did not, as did counsel in the case at bar, ask the witness to hunt through Dana and see if he could find a statement *supporting* the witness' testimony.

Counsel for defendant has not cited, and we submit, cannot produce, any authority permitting the course of examination undertaken by defendant's counsel at the trial in attempting to compel the witness to search through medical books for statements *in support* of his testimony.

The contrary to this proposition is announced in *Bell v. Milwaukee, etc. Railway Co.*, 172 N. W. (Wis.) 791, where opposing counsel attempted, on cross-examination, to introduce excerpts from scientific treatises in evidence, where such excerpts did not tend in any way to contradict or impeach the witness' testimony. Opposing counsel asked the witness, who was a doctor, on cross-examination "if he considered Oppenheim an authority on optic atrophy". Upon the witness answering that he had read a number of Oppenheim's works, counsel

undertook to read certain extracts from the book and then asked the witness the following question:

“Having your attention called to that passage from Oppenheim \* \* \* do you recall ever having read that before?”

The Supreme Court held that

“under repeated decisions of (our) court its admission was erroneous.”

So, too, in *Marshall v. Brown*, 15 N. W. (Mich.) 755, the court, speaking through Judge Cooley, said:

“On the cross-examination of Dr. Wood, a witness for the defendant, he was asked if he was acquainted with a certain book. He replied that he had heard of it but had not read it. He was then asked whether it was considered good authority, and he said it was. He was then *requested to read a certain paragraph during the recess of the court*. When the court convened again, he was recalled and counsel reading from the book the paragraph to which his attention had been called, asked him whether there was a case reported of taking sulphate of zinc, followed by vomiting, purging, and death? As this was what the paragraph stated, the evident purpose of the question was to put the passage from the book in this indirect manner before the jury instead of reading from it directly. The witness demurred to this method of examination, but was required to answer and did so. The case differs from *Finney v. Cotrell*, 48 Mich. 584, (S. C. 12 N. W. Rep. 862), where a medical book was produced to *contradict* a witness who professed to be testifying from it.”

So, too, in *City of Bloomington v. Shrock*, 110 Ill. 219, a doctor was called as a witness in a negligence

case for plaintiff and in his direct examination made no reference to any book. On cross examination defendant's counsel asked him whether he was acquainted with certain medical treatises, naming them, and upon his responding in the affirmative and to the effect that they were standard authorities, counsel proceeded to read at length from these treatises and then inquired of the witness *whether he agreed with the authorities as to the parts so read*. The trial court overruled an objection to this evidence on the part of plaintiff's counsel and on appeal the Supreme Court of Illinois reversed the judgment on account of the error of the trial court in permitting this line of examination. The court said, at pp. 222-223:

“Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories, would obviously be quite as competent as the first. *But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory.*”

The authorities cited by defendant in its brief (pp. 53-54) are all authorities which support plain-

tiff's contentions and do not at all support defendant.

Thus in the citation from *Wigmore*, "*On Evidence*", on p. 53 of the brief, it is said:

"Where a witness has been allowed to refer to a treatise as corroborating him, the treatise may be read to show that it does not contain such corroboration on the principle of *discrediting* the witness by showing misstatements on a material point."

In *Pinney v. Cahill*, 12 N. W. (Mich.) 862 (cited at p. 54 of defendant's brief), the court says that medical treatises may be referred to "not to prove the facts it contained but to disprove the statement of the witness", etc.

So, too, in *Clark v. Commonwealth*, 63 S. W. 740 (cited by defendant on p. 54 of the brief), it appears that on cross examination the medical witness referred to a medical work by Dr. Dodd. Opposing counsel then offered to show from Dr. Dodd's treatise that the statement in said treatise was different from the statement of the witness in order to *discredit* the expert in connection with his cross examination. The court very properly held that the evidence was admissible for this purpose.

Furthermore, there is nothing to show what statements were contained in "Keene", or, for that matter, in any of the other books cited, and so this court is unable to see whether defendant was prejudiced or not, assuming purely for the sake of argument



that the court should have permitted the line of examination undertaken by defendant's counsel.

Thus, in *People v. Goldenson*, 76 Cal. 328, the court said, at p. 349:

“If the portions which were excluded had any tendency to discredit or contradict the witness upon any matter about which he had testified, they ought to have been incorporated into the Bill of Exceptions, so that we might determine whether they were pertinent. They are not in the Bill.”

The opinion of the Supreme Court of the Territory of Hawaii in the case at bar on this point (Tr. pp. 362-363) is, we submit, a full and correct exposition of the law on the subject.

Counsel for defendant complains of the denial by the court of his request that Dr. Osorio be compelled to produce “some of the books” named by defendant's counsel from the doctor's office in the courtroom for use by defendant's counsel in having the doctor “read the extracts from these books, or refer to the extracts from the books” (Tr. p. 249).

The court was thus correct in refusing to have the witness produce the books for the purposes stated, since they would, if produced, have been used for the purpose stated.

But assuming that the request had been made to have the books produced for the purpose of being consulted by counsel for defendant in order to afford counsel the opportunity of seeing if they contained any statements *at variance* with the state-

ments of Dr. Osorio, in order that Dr. Osorio might be further examined, was it error for the court to deny the motion to compel the witness to bring his books into court?

At common law no person was bound to furnish his adversary with evidence to be used against him.

The right to the inspection of books and papers with a view to discovery of evidence is not to be confused with the production of them on examination of a party as a witness before trial. The party examined before trial may be requested by subpoena duces tecum to produce books and papers and they will be used upon the examination in the same way as if produced on his examination as a witness at the trial.

It is submitted that the refusal of the court to compel the witness to produce the books was a matter resting in its discretion, and could not be assigned as error. The record shows that the books were standard authorities which all doctors have in their possession, and there is no showing that defendant did not have access to them.

In *Commonwealth v. Lannan*, 13 Allen (Mass.) 563,

the following appears: at the trial, which was in Essex County, a witness for the commonwealth, having testified on cross examination that he looked at a memorandum made by him of the facts as to which he testified, before leaving Boston on the morning of the trial for the purpose of refreshing

his memory, and that the memorandum was in Boston at the time of his testifying, defendant's counsel requested the court to require the witness to produce the memorandum. The court said:

“Requesting the witness to produce a memorandum which is not in court and which he has not been summoned to produce is a matter within the discretion of the court and a refusal to require it is no cause of exception.”

Counsel for defendant was given every opportunity to examine the books which he requested the witness for plaintiff to produce, and if the statements made by the witness were not correct the ordinary course of procedure would have been to offer the books in evidence if they contradicted any statement made by the witness.

Furthermore, plaintiff's attorney consented that defendant's counsel might recall the witness if he wanted to ask him any questions based on these authorities (Tr. p. 249).

It is to be presumed as a fair inference of fact that Dr. Sexton, defendant's medical expert who testified at the trial, or other doctors in the town, had these same works at their disposal and that defendant's counsel had access to all of these books. Defendant made no showing that he had no access to these works save through the copies possessed by Dr. Osorio.

**THE RULINGS SUSTAINING CERTAIN OBJECTIONS TO  
QUESTIONS ASKED ON CROSS-EXAMINATION.**

And finally, plaintiff in error (defendant) contends that defendant's counsel was unduly restricted in the scope of his cross-examination of Dr. Osorio. This point is covered by Specifications of Error Nos. 7, 8, 9, 10 and 11. Taking them up in order:

Specification of Error No. 7, the proceedings relating to this Specification of Error are set out in the transcript at p. 268. Dr. Osorio, in answer to several questions previously directed to the same point, testified in substance that he considered it proper treatment after the plaintiff had had three weeks rest in bed to put a bandage on her knee and let her walk around her house, and that such treatment would not retard recovery but would help it (Tr. pp. 264-5). Defendant's counsel almost "nagged" the witness on this point and finally the trial court, without any suggestion of plaintiff's counsel and in the exercise of a proper discretion, required defendant's counsel to proceed to his next point. As the court said "this has been answered three or four times" (Tr. p. 268).

Specification of Error No. 8 (Tr. p. 260) goes to the same point as Specification of Error No. 7. Defendant's counsel came back to the same line of examination already fully covered and the court sustained objections to a repetition of these questions,—all the same in substance.

Specification of Error No. 9 (Tr. p. 269) goes to the same point as Specifications Nos. 7 and 8.



Specification of Error No. 10 (Tr. p. 272) also goes to the same point. The doctor had previously answered several times the substance of this question, and the court on its own motion, considering that the point had been fully covered by the doctor's previous answers, required defendant's counsel to discontinue this line of examination.

Specification of Error No. 11 (Tr. p. 279). There was nothing harmful in this motion of the court. Defendant in its brief (p. 37) does no more than mention this specification of error and does so without comment or argument in support of this error.

We respectfully submit that the judgment should be affirmed.

Dated, May 26, 1923.

FRED PATTERSON,

CHARLES S. DAVIS,

MORRISON, DUNNE & BROBECK,

EDWARD HOFFELD,

*Attorneys for Defendant in Error.*

United States  
<sup>3</sup>  
Circuit Court of Appeals  
For the Ninth Circuit.

---

D. PINCOLINI and J. PINCOLINI,  
Plaintiffs in Error,  
vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District  
Court of the District of Nevada.

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FILED  
APR 11 1923  
T. D. MONKTON,  
CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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D. PINCOLINI and J. PINCOLINI,  
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vs.  
THE UNITED STATES OF AMERICA,  
Defendant in Error.

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Court of the District of Nevada.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit of Service of Citation to Writ of Error .....	68
Affidavit of Service of Writ of Error.....	70
Affidavit on Motion for New Trial.....	37
Arraignment .....	13
Assignment of Errors of Defendants D. Pincolini and J. Pincolini.....	41
Bail Bond of D. Pincolini on Writ of Error..	61
Bail Bond of J. Pincolini on Writ of Error...	57
Bench Warrant .....	7
Bill of Exceptions .....	72
Certificate of Clerk U. S. District Court to Transcript of Record .....	106
Citation to Writ of Error.....	110
Cost Bond on Writ of Error.....	64
Indictment for Violation of Sec. 37 F. C. C. and the National Prohibition Act.....	1
Judgment .....	39
Judgment Order .....	24
Minutes of Court—August 16, 1922—Order for Issuance of Capias .....	13

Index.	Page
Minutes of Court—August 26, 1922—Arraign- ment .....	13
Minutes of Court—October 2, 1922—Order Set- ting Trial Date .....	14
Minutes of Court—November 20, 1922—Order Resetting Trial Date .....	14
Minutes of Court—November 27, 1922—Trial..	15
Minutes of Court—November 28, 1922—Trial (Continued) .....	18
Minutes of Court—November 29, 1922—Trial (Continued) .....	19
Minutes of Court—December 4, 1922—Order Continuing Passing of Sentence to Decem- ber 23, 1922 .....	22
Minutes of Court—December 23, 1922—Order Continuing Passing of Sentence to January 10, 1923 .....	22
Minutes of Court—January 9, 1923—Order Continuing Passing of Sentence to January 17, 1923 .....	23
Minutes of Court—January 17, 1923—Order Continuing Passing of Sentence to January 18, 1923 .....	23
Minutes of Court—January 18, 1923—Judg- ment Order .....	24
Minutes of Court—February 19, 1923—Order Continuing Time to File Record on Ap- peal .....	25
Minutes of Court—February 23, 1923—Order Continuing Settlement of Bill of Excep- tion .....	26

Index.	Page
Minutes of Court—March 3, 1923—Withdrawal of Plaintiff's Objections to Bill of Exception, Which is to be Settled by Stipulation.	26
Minutes of Court—March 10, 1923—Order Fixing Time for Proposed Bill of Exception to be Presented for Approval . . . . .	27
Minutes of Court—March 19, 1923—Order Approving Bill of Exception and Continuing Time to File Record . . . . .	28
Motion for New Trial . . . . .	32
Motion in Arrest of Judgment . . . . .	28
Names and Addresses of Attorneys of Record..	1
Order Allowing Writ of Error . . . . .	56
Order Approving Bill of Exception and Continuing Time to File Record . . . . .	28
Order Continuing Passing of Sentence to December 23, 1922 . . . . .	22
Order Continuing Passing of Sentence to January 10, 1923 . . . . .	22
Order Continuing Passing of Sentence to January 17, 1923 . . . . .	23
Order Continuing Passing of Sentence to January 18, 1923 . . . . .	23
Order Continuing Settlement of Bill of Exception . . . . .	26
Order Continuing Time to File Record on Appeal . . . . .	25
Order Extending Time to and Including February 28, 1923, to File Bill of Exceptions..	71
Order Fixing Time for Proposed Bill of Exception to be Presented for Approval . . . . .	27



Index.	Page
Order for Issuance of Capias .....	13
Order Resetting Trial Date.....	14
Order Setting Trial Date.....	14
Petition for Writ of Error.....	54
Praeceptum for Transcript of Record.....	67
TESTIMONY ON BEHALF OF PLAINTIFF:	
CARTER, A. (In Rebuttal).....	88
DONNELLY, J. P. (In Rebuttal).....	79
DuBOIS, P. E. (In Rebuttal).....	89
NASH, P. (In Rebuttal).....	87
PAYNE, JONATHAN (In Rebuttal)....	85
PINCOLINI, JOE (Recalled — Cross-examination) .....	90
SCOTT, THOMAS .....	73
In Rebuttal .....	89
TESTIMONY ON BEHALF OF DEFENDANTS:	
BOYD, JAMES (Cross-examination)....	77
Trial .....	15
Trial (Continued) .....	18
Verdict (A. Pincolini) .....	9
Verdict (D. Pincolini).....	12
Verdict (J. Pincolini).....	11
Verdict (Susie Pincolini) .....	10
Withdrawal of Plaintiff's Objections to Bill of Exception, Which is to be Settled by Stipulation .....	26
Writ of Error .....	108

**Names and Addresses of Attorneys of Record.**

Messrs. McCARRAN & MASHBURN, Reno, Nevada,

For the Plaintiff in Error.

Honorable GEORGE SPRINGMEYER, United States Attorney for the District of Nevada, Reno, Nevada, and Honorable C. A. CANTWELL, Assistant United States Attorney for the District of Nevada, Reno, Nevada,

For the Defendant in Error. [1\*]

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In the District Court of the United States, in and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Indictment for Violation of Sec. 37 F. C. C. and  
The National Prohibition Act.**

United States of America,

District of Nevada,—ss.

Of the May Term of the District Court of the United States of America, in and for the District of Nevada, in the year of our Lord nineteen hundred and twenty-two,—

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\*Page-number appearing at foot of page of original certified Transcript of Record.

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

That A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereinafter called the defendants, heretofore and at some time prior to August 2, 1922, the exact date being unknown, before the finding of this indictment, in the City of Reno, Washoe County, State and District of Nevada, in violation of Section 37 of the Criminal Code, did wilfully, unlawfully, knowingly and corruptly conspire, combine, confederate and agree to commit offenses against the United States of America, to wit: to possess and sell at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, State and District of Nevada, intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes, in violation of the National [2] *Prohibition*, and that the aforesaid conspiracy continued and was in process of execution by said defendants during and including August 2d, 1922, and at the time of the commission of each of the overt acts in this count set forth.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereinafter called the defendants, heretofore, to wit: On August 2d, 1922,

before the finding of this indictment, in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, State and District of Nevada, did wilfully, unlawfully and knowingly possess and sell intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereinafter called the defendants, heretofore, to wit: On August 2d, 1922, before the finding of this indictment, in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, State and District of Nevada, did have rooms under lock and key into which only persons known by said defendants to be addicted to the use of intoxicating liquor were admitted.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

That the said A. Pincolini, D. Pincolini, J. Pincolini and [3] Susie Pincolini, hereinafter called the defendants, heretofore, to wit: On August 2d, 1922, before the finding of this indictment, and in



pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, State and District of Nevada, did upon the approach of Federal Prohibition Agents and in their presence, wilfully and knowingly destroy intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes;

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

## SECOND COUNT.

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereafter called the defendants, heretofore, to wit: On or about the 2d day of August, 1922, and before the finding of this indictment, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," did then and there wilfully, unlawfully and knowingly possess intoxicating liquor, to wit: liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present: [4]

### THIRD COUNT.

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereafter called the defendants, heretofore, to wit: On or about the 2d day of August, 1922, and before the finding of this indictment, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," did then and there wilfully and unlawfully sell intoxicating liquor, to wit: liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

### FOURTH COUNT.

That the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, hereinafter called the defendants, heretofore, to wit: On or about the 2d day of August, 1922, and before the finding of this indictment, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, in violation of Section 21, Title II, of

the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," did then and there wilfully and unlawfully maintain a common nuisance in that the said A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, did wilfully and unlawfully keep for sale in that certain building situate at number 214 Lake Street, Reno, County of Washoe, State and District of Nevada, and described as the "Mizpah Hotel," intoxicating liquor, to wit: liquor containing one-half or one per cent, or more, of alcohol by volume, fit for [5] use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

GEORGE SPRINGMEYER,

United States Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing indictment: P. Nash.

[Endorsed]: No. 5663. United States District Court, District of Nevada. The United States of America vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Indictment for Violation Sect. 37 F. C. C. A True Bill. W. P. Harrington, Foreman. Filed in open Court this 16th day of August, A. D. 1922. E. O. Patterson, Clerk. Bail, \$——. Jany. 18—Each—5 Months and Each 500.00 Fine and Costs. [6]

**Bench Warrant.**

UNITED STATES OF AMERICA,  
District of Nevada.

To the Marshal of the United States for the District of Nevada, and to His Deputies and Any or Either of Them,—GREETING:

WHEREAS, at a District Court of the United States of America, begun and held at Carson City, Nevada, within and for the District aforesaid, on the 1st day of May, 1922, the Grand Jurors in and for said District brought into said Court a true bill of indictment against A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, charging them with the crime of having on or about August 2, 1922, at Reno, in the county of Washoe, District of Nevada, violated Section 37 F. C. C. and the National Prohibition Act, as by said indictment now remaining on file and of record in said court more fully appears, to which indictment the said defendants hath not yet appeared or pleaded.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States, to apprehend the said defendants and bring them before said Court in Carson City, Nevada, to answer unto said indictment Aug. 26, 1922, or, if they require it that you take them before the Judge of said Court, or any United States Commissioner in said District, that they each may give bail in the sum of \$1500.00 each and all of them to answer said indictment.



WITNESS, the Honorable E. S. FARRINGTON, Judge of said District Court, and the seal thereof hereunto affixed, at Carson City, Nevada, this 16th day of August, 1922.

[Seal]

Attest: E. O. PATTERSON,  
Clerk.

By O. E. Benham,  
Deputy.

GEORGE SPRINGMEYER,  
U. S. Attorney. [7]

[Endorsed]: No. 5663. United States District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Bench Warrant. Filed on return this 7th day of Sept., 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk.

Criminal Docket No. 3535.

#### MARSHAL'S RETURN.

Executed the within bench warrant on the within named defendants at Carson City, Nevada, on the 26th day of August, 1922, and I now have them before the United States District Court at Carson City, Nevada, this 26th day of August, 1922.

J. H. FULMER,  
U. S. Marshal.

By J. P. Fodrin,  
Deputy Marshal.

In the District Court of the United States for the  
District of Nevada.

No. 5663.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Verdict (A. Pincolini).**

We, the jury in the above-entitled case, find the defendant, A. Pincolini, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; not guilty as charged in the third count; and not guilty as charged in the fourth count.

Dated this 29th day of November, 1922.

C. F. STOCK,  
Foreman.

[Endorsed]: No. 5663. U. S. District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Verdict. Filed this 29 day of November, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.

In the District Court of the United States for the  
District of Nevada.

No. 5663.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Verdict (Susie Pincolini).**

We, the jury in the above-entitled case, find the defendant, Susie Pincolini, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; not guilty as charged in the third count; and not guilty as charged in the fourth count.

Dated this 29th day of November, 1922.

C. F. STOCK,  
Foreman.

[Endorsed]: No. 5663. U. S. District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Verdict. Filed this 29 day of November, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.  
[8]

In the District Court of the United States for the  
District of Nevada.

No. 5663.

THE UNITED STATES

vs,

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Verdict (J. Pincolini).**

We, the jury in the above-entitled case, find the defendant, J. Pincolini, not guilty as charged in the first count of the indictment; guilty as charged in the second count; guilty as charged in the third count; and guilty as charged in the fourth count.

Dated this 29th day of November, 1922.

C. F. STOCK,  
Foreman.

[Endorsed]: No. 5663. U. S. District Court, District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. Verdict. Filed this 29th day of November, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy.



In the District Court of the United States for the  
District of Nevada.

No. 5663.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Verdict (D. Pincolini).**

We, the jury in the above-entitled case, find the  
defendant, J. Pincolini, not guilty as charged in  
the first count of the indictment; guilty as charged  
in the second count; guilty as charged in the third  
count; and guilty as charged in the fourth count.

Dated this 29th day of November, 1922.

C. F. STOCK,

Foreman.

[Endorsed]: No. 5663. U. S. District Court,  
District of Nevada. The United States vs. A. Pin-  
colini, D. Pincolini, J. Pincolini and Susie Pincolini.  
Verdict. Filed this 29th day of November,  
1922. E. O. Patterson, Clerk. By O. E. Benham,  
Deputy. [9]

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No. 5663.

Indictment for Violation Section 37, F. C. C. and  
National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—August 16, 1922—Order for Issuance of Capias.**

The Grand Jury impaneled in and by this Court having this day presented a true bill of indictment in this case, IT IS ORDERED that a capias issue herein returnable Saturday, August 26, 1922, at ten o'clock A. M., and that, when apprehended, the defendants may be admitted to bail upon giving a good and sufficient bond in the sum of \$1500.00 each.

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No. 5663.

Indictment for Violation Section 37, F. C. C. and  
National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—August 26, 1922—Arraignment.**

These defendants appeared this day with their attorney, Mr. T. J. D. Salter, and were thereupon duly arraigned upon the said indictment as required by law. They each declared their true name to be as stated in the indictment and each entered a plea of not guilty as charged in the indictment. Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the bond of these defendants be, and the same is hereby, fixed at Twenty-five Hundred

(\$2500.00) Dollars each to be filed Monday, August 28, 1922. [10]

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No. 5663.

Indictment for Violation Section 37, F. C. C., and  
National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—October 2, 1922—Order Setting  
Trial Date.**

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that the trial of this case be, and the same is hereby, set down for October 4, 1922, at ten o'clock A. M.

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No. 5663.

Indictment for Violation National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—November 20, 1922—Order Re-  
setting Trial Date.**

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that

this case be, and the same is hereby, set down for trial on November 27, 1922, to follow case No. 5619.

---

No. 5663.

Indictment for Violation Section 37, Criminal Code  
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—November 27, 1922—Trial.**

This cause coming on regularly for trial this day, Mr. C. A. Cantwell, *Assistant United States*, appeared for and on behalf of the plaintiff: Messrs. T. J. D. Salter and James Frame for the defendants,—the defendants being personally present. Stipulated by counsel that if there are not sufficient jurors upon the regular [11] panel that Talesman may be brought in from Ormsby County. The following named jurors were accepted by the parties and duly sworn to try the issue, viz.: L. Radcliffe, Fred Allerman, Herbert B. Maxon, A. B. Dickinson, Howard Sullivan, R. H. Roy, Charles A. Brulin, Charles Miller, Thomas Rowe, C. F. Stock, Jerald P. Miller and F. S. Cliff. The indictment was read to the jury by the clerk and the pleas of the defendants stated. Upon motion of Mr. Frame the following named witnesses were marshaled and duly sworn



and admonished by the Court, viz.: P. Nash, Thomas Scott, R. L. Hogue, A. Carter and P. E. DuBois for plaintiff; and W. M. McCafetry, the only witness, for defendants. P. Nash was the first witness called by plaintiff and during his testimony plaintiff had marked one pint bottle two-thirds full of liquor, Plffs. Ex. No. 1 for Identification; one small individual bottle nearly full of liquor marked Plffs. Ex. No. 2 for Identification; one pint bottle two-thirds full liquor marked Plffs. Ex. No. 3 for Identification; one pint bottle one-fourth full of liquor marked Plffs. Ex. No. 4 for Identification; one, one-gallon demijohn wrapped in newspaper marked Plffs. Ex. No. 5 for Identification; one, one-gallon demijohn wrapped in newspaper marked Plffs. Ex. No. 6 for Identification; one, one-gallon demijohn wrapped in newspaper marked Plffs. Ex. No. 7 for Identification; one sealed milk bottle with dregs of liquor marked Plffs. Ex. No. 8 for Identification; five small liquor glasses marked Plffs. Ex. No. 9 for Identification; one medium sized funnel marked Plffs. Ex. No. 10 for Identification; one large funnel marked Plffs. Ex. No. 11 for Identification; one broken pair of ladies' scissors marked Plffs. Ex. No. 12 for Identification; one gunny-sack one-third full of broken glass marked Plffs. Ex. No. 13 for Identification; three silver dollars dated 1882, 1890 and 1900 respectively marked Plffs. Ex. No. 14 for Identification; one "Clinton" lock-key marked Plffs. Ex. No. 15 for Identification. The witness also testified from a blackboard sketch made by himself. Thomas

Scott and P. E. DuBois were each called in turn and testified for plaintiff. Mr. S. C. Dinsmore, State Chemist, was duly sworn and testified for plaintiff, and during his testimony plaintiff had marked one half-pint flask partially filled with liquor Plffs. Ex. No. 16 for Identification; and another half-pint flask partially filled with liquor Plffs. Ex. No. 17 for Identification. And during the testimony of the last two witnesses Plffs. Ex. Nos. 8 for Identification; 5 for Identification; 6 for Identification; 7 for Identification; 13 for Identification and 10 for Identification, all offered in evidence, admitted and ordered marked Plffs. Ex. Nos. 8, 5, 6, 7, 13 and 10. At 4:45 o'clock P. M. the jury was admonished by the Court not to talk among themselves about the case nor to allow others to talk to them or in their presence and to refrain from making up their minds as to what their verdict would be until the case was finally submitted to them and they were excused until ten o'clock to-morrow morning. [12]

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No. 5663.

Indictment for Violation Section 37, Criminal Code, and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—November 28, 1922—Trial (Continued).**

The same counsel, the defendants and the jury being present the trial of this case was resumed this day. Witnesses A. Carter, R. L. Hague and Thomas Scott were each called in turn by plaintiff and during their testimony Plffs. Ex. Nos. 15, 1, 2, 3, 4, 14, 12, 16, 17, and 9 all for Identification, admitted and ordered marked Plffs. Ex. Nos. 15, 1, 2, 3, 4, 14, 12, 16, 17 and 9 respectively. Thereupon plaintiff rested. Upon motion of Mr. Frame the jury was excused to allow him to make a motion without their hearing. Mr. Frame moved the Court for a directed verdict of not guilty as to the defendants A. Pincolini, D. Pincolini and J. Pincolini; and he also moved the Court for a directed verdict as to Susie Pincolini. Both motions argued by counsel for the respective parties and IT IS ORDERED that the said motions be, and the same are hereby, denied. Defendants waived their opening statement. The following witnesses were produced at this time for defendants, each duly sworn and placed under the rule after being admonished by the Court, viz.: A. B. McAvoy, L. M. Leonard, John Capuro, James Boyd, A. Blundell, John W. O'Bannion, Averita Pincolini and Louigi Toccini and all were called and testified in behalf of the defendants except the witness Blundell; and in addition to these witnesses the defendant Dante Pincolini was duly sworn and testified. Mr. Charles Bondietti was

also sworn as interpreter for the witness Louigi Toccini. At 4:30 P. M. the Court again admonished the jury as before and excused them until ten o'clock to-morrow morning.

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No. 5663.

Indictment for Violation Section 37, Criminal Code, and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—November 29, 1922—Trial (Continued).**

The same counsel, the defendants and the jury being present the trial of this case was resumed this day. A. Pincolini, Susie Pincolini and Joe Pincolini, the defendants, were each duly sworn and testified in their own behalf; and James Boyd was recalled and further testified upon direct for defendants. During this testimony defendant offered in evidence one hollow sink leg four or five inches square, admitted and ordered marked Defts. Ex. No. A. Thereupon defendants rest. J. P. Donnelly and Jonathan Payne were each duly sworn and testified in rebuttal for plaintiff; and witnesses P. Nash, R. L. Hague, A. Carter, P. E. DuBois and Thomas Scott. By stipulation plaintiff was allowed to recall defendants' witness Joe



[13] Pincolini upon further cross-examination. No further testimony being adduced and after argument by counsel for the respective parties the case was submitted. Thereupon, and after hearing the instructions given by the Court, the jury retired in charge of the Marshal to deliberate on the case, and at 8:30 o'clock P. M. came into court with the following verdict, viz.: "In the District Court of the United States for the District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. No. 5663. We, the jury in the above-entitled case, find the defendant A. Pincolini, not guilty as charged in the first count of the Indictment; not guilty as charged in the second count; not guilty as charged in the third count; and not guilty as charged in the fourth count. Dated this 29th day of November, 1922. C. F. Stock, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. No. 5663. We, the jury in the above-entitled case find the defendant D. Pincolini, not guilty as charged in the first count of the Indictment; guilty as charged in the second count; guilty as charged in the third count; and guilty as charged in the fourth count. Dated this 29th day of November, 1922. C. F. Stock, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. No. 5663. We, the jury in the above-entitled case, find the defendant,

J. Pincolini, not guilty as charged in the first count of the Indictment; guilty as charged in the second count; guilty as charged in the third count; and guilty as charged in the fourth count. Dated this 29th day of November, 1922, C. F. Stock, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. No. 5663. We, the jury in the above-entitled case, find the defendant Susie Pincolini, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; not guilty as charged in the third count; and not guilty as charged in the fourth count. Dated this 29th day of November, 1922. C. F. Stock, Foreman,"—and so they all say. IT IS ORDERED that the defendants D. Pincolini and J. Pincolini be and appear in this court on December 9th, 1922, at ten o'clock for sentence. IT IS FURTHER ORDERED that the bonds of the defendants A. Pincolini and Susie Pincolini be and they are hereby discharged and the bondsmen relieved from further liability thereon. [14]

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No. 5663.

Indictment for Violation National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—December 4, 1922—Order Continuing Passing of Sentence to December 23, 1922.**

Upon motion of Mr. P. A. McCarran that he has just been retained as counsel in this case and that the former counsel are about to retire, IT IS ORDERED that the defendants have to and until December 23, 1922, within which to prepare their papers on appeal and that the matter of passing sentence be continued to and until that date.

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No. 5663.

Indictment for Violation of Section 37, Criminal Code and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—December 23, 1922—Order Continuing Passing of Sentence to January 10, 1923.**

Upon motion of Mr. P. A. McCarran, attorney for the defendants herein, IT IS ORDERED that the passing of sentence in this case be, and the same is hereby, continued to and until January 10th, 1923, at ten o'clock A. M. [15]

No. 5663.

Indictment for Violation of National Prohibition  
Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—January 9, 1923—Order Con-  
tinuing Passing of Sentence to January 17,  
1923.**

Upon motion of Mr. P. A. McCarran, attorney  
for the defendants herein, and good cause being  
shown, IT IS ORDERED that the time for pass-  
ing sentence in this case be, and the same is hereby,  
continued to and until January 17, 1923, at ten  
o'clock A. M.

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No. 5663.

Indictment for Violation of National Prohibition  
Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—January 17, 1923—Order Con-  
tinuing Passing of Sentence to January 18,  
1923.**

Upon motion of Mr. G. Mashburn, attorney for



these defendants, IT IS ORDERED that the passing of sentence in this case be, and the same is hereby, continued to and until to-morrow morning at ten o'clock. [16]

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No. 5663.

Indictment for Violation of National Prohibition Act, and Section 37, Criminal Code.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—January 18, 1923—Judgment Order.**

The defendants J. and D. Pincolini appeared this day with their attorney, Mr. P. A. McCarran, who presented a motion for a new trial and a motion in arrest of judgment. Both motions submitted to and by the Court ORDERED overruled and denied. This being the time heretofore fixed for sentence in this case the Court pronounced judgment as follows, addressing the defendants J. Pincolini and D. Pincolini: In consideration of the law and the premises, IT IS HEREBY ORDERED AND ADJUDGED that you and each of you be imprisoned in the county jail of Washoe County, Nevada, for the period of five (5) months from and after this date, that you pay to the United States a fine in the sum of Five Hundred (\$500.00) Dollars each and that you stand committed in said

county jail until the said fines are paid together with all costs herein incurred. Thereupon Mr. McCarran filed his assignments of error; petition for writ of error; bond on writ of error in the sum of Four Thousand (\$4,000.00) Dollars each; cost bond in the sum of Five Hundred (\$500.00) Dollars; and IT IS ORDERED that the said Four Thousand Dollar bonds be, and they are considered and may act as a supersedeas bond in each case. IT IS FURTHER ORDERED that the writ of error be, and the same is hereby, allowed. [17]

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No. 5663.

Indictment for Violation Section 37, Criminal Code  
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—February 19, 1923—Order Continuing Time to File Record on Appeal.**

Upon motion of Mr. P. A. McCarran, attorney for defendants, IT IS ORDERED that the defendants be, and they are hereby allowed to and until March 19th, 1923, within which to prepare and file record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5663.

Indictment for Violation Section 37, Criminal Code  
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—February 23, 1923—Order Con-  
tinuing Settlement of Bill of Exception.**

Upon motion of Mr. C. A. Cantwell, Assistant  
United States Attorney, IT IS ORDERED that  
the hearing and settlement of bill of exception in  
this case be, and the same is hereby continued to  
March 3, 1923, at ten o'clock A. M. [18]

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No. 5663.

Indictment for Violation Section 37, Criminal Code  
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—March 3, 1923—Withdrawal of  
Plaintiff's Objections to Bill of Exception,  
Which is to be Settled by Stipulation.**

Upon stipulation of counsel, IT IS ORDERED  
that plaintiff be, and it is hereby allowed to with-

draw plaintiff's objections to the proposed bill of exception upon defendant incorporating all amendments and objections as therein contained, in a proposed bill of exception, to be settled by counsel on stipulation.

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No. 5663.

Indictment for Violation Section 37, Criminal Code  
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Minutes of Court—March 10, 1923—Order Fixing  
Time for Proposed Bill of Exception to be  
Presented for Approval.**

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that the engrossed bill of exception be presented to this Court for settlement and approval on March 19, 1923.

[19]

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No. 5663.

Indictment for Violation Section 37, Criminal Code  
and National Prohibition Act.

THE UNITED STATES

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.



**Minutes of Court—March 19, 1923—Order Approving Bill of Exception and Continuing Time to File Record.**

Upon motion of Mr. G. Mashburn, attorney for defendants, IT IS ORDERED that the bill of exception here presented be, and the same is hereby settled, approved and allowed. IT IS FURTHER ORDERED that defendants be, and they are hereby allowed thirty days from and after this day within which to prepare and file record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit. [20]

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In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Motion in Arrest of Judgment.**

COME NOW the only two of the above-named defendants against whom verdicts were rendered in the above-entitled cause, to wit, D. Pincolini and J. Pincolini, and each of them, after verdict against each of them and before sentence, in their own proper person, and each in his own proper per-

son, and by McCarran & Mashburn, their attorneys, and move the above-entitled court to arrest judgment herein and not to pronounce the same, for the following reasons:

I.

That the fourth count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense in violation of Section 21, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

II.

That the second count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act [21] of Congress dated October 28, 1919, known as the National Prohibition Act.

III.

That the third count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

IV.

That the following irregularity, omission or defect appears from the record, or should appear from the record, of the proceedings had at the

trial of said cause and during said trial, outside of the evidence:

That after the jury in said action had been duly impaneled and sworn to try said cause, to wit, during the afternoon of the second day of said trial and at the close of the testimony of witness Thomas Scott and at the time counsel for the Government announced that the Government rested, the Court excused the jury and allowed it to leave the courtroom without giving the jury the usual admonition for said jurors not to discuss the case among themselves or with any other person, and without admonishing it as to any other matters contained in the usual admonition to a jury when excusing it and allowing it to leave the courtroom or to separate.

#### V.

That the evidence adduced and presented to the Court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said D. Pincolini as charged in either the second count of said indictment or in the [22] third count of said indictment or in the fourth count of said indictment.

#### VI.

That the evidence adduced and presented to the Court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said J. Pincolini as charged in either the second count of said indictment or in the third count of

said indictment or in the fourth count of said indictment.

McCARRAN & MASHBURN,  
Attorneys for Defendants, D. Pincolini and J. Pincolini.

Service of the foregoing motion in arrest of judgment by copy admitted this — day of January, A. D. 1923.

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Attorney for Plaintiff.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Motion in Arrest of Judgment. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada. Attorneys for Defendants, D. Pincolini and J. Pincolini. [23]

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In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,  
Defendants.



**Motion for New Trial.**

COMES NOW D. Pincolini and J. Pincolini, two of the defendants in the above-entitled cause, by McCarran & Mashburn, their attorneys, and move the above-entitled court to set aside the verdicts rendered against them herein, and the verdict rendered against each of them, and to grant them, and each of them, to wit, the said D. Pincolini and J. Pincolini, a new trial, and for their, and each of their, reasons therefor, and for grounds therefor, show to the Court the following:

**I.**

That the verdict so rendered herein against said D. Pincolini is contrary to the law of the case.

**II.**

That the verdict rendered herein against said J. Pincolini is contrary to the law of the case.

**III.**

That the verdict so rendered against said D. Pincolini is not supported by the evidence in and to the degree required by law. [24]

**IV.**

That the verdict so rendered against said J. Pincolini is not supported by the evidence in and to the degree required by law.

**V.**

That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said D. Pincolini.

VI.

That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said J. Pincolini.

VII.

Errors in law occurring at the trial and excepted to by the defendants, D. Pincolini and J. Pincolini, and each of them, which prejudiced each of said defendants herein named, and prevented them from having a fair and impartial trial, a memorandum of which will be served within the time required by law.

VIII.

That the fourth count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the offense charged therein.

IX.

Irregularities in the proceedings of said Court and jury, and each of them, by which said D. Pincolini and said J. Pincolini were, and each of them was, prevented from having a fair trial, as shown by the affidavit attached hereto.

X.

That the Court improperly instructed the jury to the [25] prejudice of said defendants, D. Pincolini and J. Pincolini, and each of them, in this, to wit:

(a) That the Court instructed the jury in effect that there was sufficient evidence on the third count of the indictment, to wit, the charge that said

defendants made sales of intoxicating liquor in violation of the law, as charged in the indictment, and thereby exceeded the province of the court and its jurisdiction and authority and invaded the province of the jury, in using the following language:

“There has been an abundance of evidence on the third count in the indictment, of making sales.”

(b) In giving this instruction or using this language relating to testimony given by witnesses Scott and Hogue of sales made to them:

“If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on those days,”

in that it is too broad a statement of the law in its scope, and applies, as given, to all the defendants and is not limited, as to its effect and what it shows, to the defendants who these witnesses testified made these particular sales and those shown to have been acting in concert with them or in aid of them, and also in that it invades the province of the jury in stating the effect this testimony must be given.

(c) In giving this instruction relating to the proof of possession of intoxicating liquor and the necessity of proving actual possession and knowledge of possession by each of the defendants:

“If each knew that the intoxicating liquor was there and it was kept there with his knowl-

edge, and they were engaged in the business, the possession of one would be the possession of the other," [26]

in that this instruction, as given, is not limited to a situation or condition where defendants has been proven to have been engaged in the business together and jointly, but the instruction should have contained the element of joint business or business in which the defendants concerned in the transaction were jointly engaged.

(d) In not including these words, "as to what the law is," or words of similar import, after the word, "instructions," in the following instruction:

"You are bound to submit these matters of fact to your own conscience and to your own judgment; under the instructions, and a true verdict render,"

in that and for the reason that the jury might have deemed that the instruction referred to in this language applied and referred to instructions or comments of the Court as to matters of fact and to references made by the Court to the testimony in commenting on it and on what it showed and as to its abundance or sufficiency, as in this paragraph of this motion shown, such as the comment of the Court that if certain testimony be true "it shows that defendants were engaged in that place in selling liquor," and such as the comment of the Court when it stated, "There has been an abundance of evidence on the third count in the indictment, of making sales."



(e) In summing up the testimony and applying it to the various charges in the indictment, and in commenting on it and its effect, and more particularly in this comment and question put to the jury for its consideration:

“Isn’t it rather a significant circumstance that this man only went up there on the 29th of July, it was the first time he had ever had that room, that he only stayed there until the raid was made, then disappears from the house and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming.”

[27]

(f) In calling the attention of the jury to the interest of the defendants in the case and in suggesting as an inducement for them to testify as they did in the case an attempt to shield themselves from the consequences of a violation of the law in the use of the following language, in instructing the jury as to what elements they should take into consideration in weighing the testimony in this case:

“Whether it is an attempt on his part to shield himself from the consequences of a violation of the law,”

without at the same time calling the attention of the jury to the interest that the prohibition officers might have had in the case, to wit, their anxiety to justify their conduct in making the raid and to procure a conviction upon the indictment which they had secured.

XI.

That the second count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the offense charged therein.

McCARRAN & MASHBURN,  
Attorneys for Defendants, D. Pincolini and J.  
Pincolini. [28]

In the District Court of the United States, in and  
for the District of Nevada.

No. 5663.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Affidavit on Motion for New Trial.**

State of Nevada,  
County of Washoe,—ss.

J. Pincolini, being first duly sworn, on his oath deposes and says: That he is one of the defendants in the above-entitled cause, and is informed and knows of the proceeding had at the trial of said action; that at the trial of said cause and in the afternoon of the second day thereof at the close of the testimony of one Thomas Scott, a witness produced and who testified on behalf of the plaintiff in said cause at said trial, and after

the jury in said cause had been duly impaneled and sworn to try said cause, and after the plaintiff herein had introduced and presented all its testimony and evidence in chief at said trial and counsel for plaintiff had announced to the Court that the plaintiff rested, the above-entitled court excused said jury and allowed it to leave the courtroom and the presence of the Court, and, according to the information and belief of affiant, to separate, without giving said jury the usual admonition required by law to the effect, among other things, that the jurors composing said jury must not [29] discuss the case with each other or talk to any other person about it or allow any other person to talk with them about it, and without admonishing it as to other matters contained in the usual admonition to such a jury on such an occasion when excusing it and allowing it to leave the court or to separate; but that said Court merely excused said jury at that time by using only the following language:

“You may be excused for a few minutes, gentlemen. Don’t go very far away, so you will be within reach when the Marshal calls you.”

J. PINCOLINI.

Subscribed and sworn to before me this 18th day of January, A. D. 1923.

[Seal]

GRAY MASHBURN,

Notary Public in and for the County of Washoe,  
State of Nevada.

Service of the foregoing motion for new trial and affidavit on motion for a new trial by copy admitted this — day of January, A. D. 1923.

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Attorney for Plaintiff.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Motion for New Trial and Affidavit for Same. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [30]

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In the District Court of the United States for the District of Nevada.

October Term, 1922.

Honorable E. S. FARRINGTON, Judge.

Violation of Sec. 37, F. C. C. and the National Prohibition Act.

No. 5663.

UNITED STATES OF AMERICA

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Judgment.**

This being the time heretofore appointed for



passing sentence in this case, the court pronounced judgment as follows, addressing the defendants:

You, D. Pincolini and J. Pincolini, have been indicted by the Grand Jury, impaneled in and by this court for the crime of violating Sec. 37, F. C. C. and the National Prohibition Act by wilfully, unlawfully, knowingly and corruptly conspiring, combining, confederating and agreeing to possess and sell at those certain premises known and described as the "Mizpah Hotel," situate at number 214 Lake Street, Reno, Washoe County, Nevada, intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes; wilfully, unlawfully and knowingly possessing intoxicating liquor; wilfully and unlawfully selling intoxicating liquor; and wilfully and unlawfully keeping for sale in that certain building situate at number 214 Lake Street, Reno, Washoe County, Nevada, and described as the "Mizpah Hotel," intoxicating liquor; said crime having been committed at some time prior to August 2, 1922 to August 2, 1922, and on August 2, 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found not guilty as charged in the first count of the indictment and guilty as charged in the second, third and fourth counts. The defendants were then

asked if they had any legal cause to show why the judgment of the Court should not now be pronounced against them. To which they replied that they had not. [31]

In consideration of the law and the premises, it is hereby ordered and adjudged that you, and each of you, be imprisoned in the county jail of Washoe County, Nevada, for the period of Five (5) Months from and after this date, and pay to the United States a fine of Five Hundred (\$500.00) Dollars each, and that you stand committed in said county jail until the fines and costs, taxed at \$——, are paid.

Dated and entered January 18, 1923.

Attest: E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy. [32]

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In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Assignment of Errors of Defendants D. Pincolini  
and J. Pincolini.**

D. Pincolini and J. Pincolini, the only defendants

named in the above-entitled cause against whom verdicts of guilty were returned in said cause, and each of them, by their attorneys, McCarran & Mashburn, in connection with their, and each of their, petition for a writ of error, makes the following assignment of errors, which they allege, and each of them alleges, occurred upon the trial of said cause:

### I.

That the Court erred in excusing the jury in said cause and allowing it to leave the courtroom after said jury had been duly empanelled and sworn to try said cause, to wit, during the afternoon of the second day of said trial and at the close of the testimony of the witness Thomas Scott and at the time counsel for the Government announced that the Government rested, without giving the jury the usual admonition required by law for said jurors not to discuss the case among themselves or with any other person, and without admonishing it as to any other matters contained in [33] the usual admonition to a jury when excusing it and allowing it to leave the courtroom or to separate, as required by law.

### II.

That the Trial Court erred in not permitting and directing the witness testifying for the plaintiff in said cause, P. Nash, to withdraw the key introduced in evidence in the trial of said case as the key to one of the doors between the barroom and the dining-room or ball-room and broken by said witness Nash, and introduced in evidence as Plain-

tiff's Exhibit No. —, and to visit the premises, to wit, Mizpah Hotel, and see if said key fit said door so broken between the soft-drink room, sometimes called the barroom, and the ball-room, sometimes called the dining-room, in said hotel, and to see if there was another door leading from one of said rooms to the other of said rooms, as requested by counsel for defendants.

### III.

That said Trial Court also erred in stating that Mr. Saulter, one of defendants' counsel, was not fair in reading the testimony given by Mr. P. E. DuBois at the preliminary examination in said cause to said witness DuBois on the trial of said cause in contradiction of the testimony given by said witness at the trial.

### IV.

That said Trial Court also erred in commenting on an effort of defendants' counsel to elicit from plaintiff's witness Scott whether he ever represented himself to be an insurance agent, and more especially in using the following language, "It [the testimony sought] is utterly irrelevant and wasting time," used by the Court, which comment tended to prejudice defendants and their counsel in the minds of the jury. [34]

### V.

That said Trial Court also erred in refusing and denying the motion of defendants herein D. Pincolini, J. Pincolini and A. Pincolini, made at the time plaintiff rested, for the Court to instruct the jury that the evidence adduced and presented to the



Court by plaintiff was insufficient at the time said plaintiff rested to justify a conviction of conspiracy.

#### VI.

That said Trial Court erred in overruling and denying the motion of the defendant Susie Pincolini, made at the time plaintiff rested, for the Court to direct a verdict of not guilty as to her.

#### VII.

That said Trial Court also erred in commenting before and in the presence of the jury on the failure of defendants and their counsel to place their witnesses under the rule, even after it was shown that said witnesses had not been present in the courtroom and had just arrived in Carson City, Nevada, where said case was then being tried, and more especially in the comment of the Court at that time that said failure to put defendants' witnesses under the rule had given defendants an advantage over the Government.

#### VIII.

That said Trial Court erred in commenting on the form of the questions asked by defendants' counsel in the examination of defendant D. Pincolini while he was testifying in behalf of defendants, and more especially in the use of the language which necessarily left the impression that counsel was indicating to his said client and witness, D. Pincolini, the answers he wished him to make. [35]

#### IX.

That the Trial Court also erred in permitting counsel for plaintiff to ask a question of defend-

ants' witness James Boyd tending to belittle and degrade said witness in the minds of the jury, and especially in the use of the following language contained in the question so asked of said witness, "Do you realize right now that if we had the marshal put you under arrest on charge of having possessed liquor on that day there would be nothing for you to do but enter a plea of guilty," and in overruling the objection made to said question by defendants' counsel.

### X.

That the Trial Court also erred in permitting the plaintiff's witness J. P. Donnelly to testify in rebuttal, over defendants' objection, as to seeing witness Hogue at his office at the time said witness Hogue was at his office, and other matters relating to his presence there, and also in permitting testimony as to the same in rebuttal from witnesses Payne, Nash, Hogue, Carter, DuBois and Scott.

### XI.

That the Trial Court also erred in permitting counsel for plaintiff to suggest and indicate the answer he wished the witness Scott to make to his questions asked of said witness when called in rebuttal as to what he meant by the word "alone" in his testimony given in the preliminary examination in this cause on August 3, 1922, before Anna M. Warren, United States Commissioner, at Reno, at which preliminary examination he testified that when he entered room 16 in said Mizpah Hotel he entered it alone, whereas he testified in the trial of said cause that when he entered said room 16

he entered it with Susie Pincolini, one [36] of the defendants in the above-entitled cause.

## XII.

That said Trial Court also erred in permitting counsel for plaintiff to ask the question of defendant herein J. Pincolini when recalled for further cross-examination by counsel for plaintiff as to an alleged conversation between said witness and defendant J. Pincolini and officers Brown and Nash said to have taken place about February 18, 1922, which question was in the following language:

“Now calling your attention to that particular day, whenever it was, that the officers were there and searched, do you recall having had a conversation with officers Brown and Nash that day there in the vicinity of the Mizpah Hotel, in which you said to them, in substance at least, ‘Well, you didn’t find anything, did you?’ to which Mr. Nash replied in substance, ‘No, but we found plenty of indications in the back room and cellars, I guess you will not deny that you had it there, you will surely get caught if you keep it up,’ and to which you replied, ‘Well, I don’t consider that it is committing a crime to sell liquors, and will keep on selling as long as I am out of jail,’ to which Mr. Nash replied to you in effect, ‘All right, if that is the way you feel about it’?”

to which question defendants objected.

## XIII.

That the Trial Court erred in denying the motion of said defendants D. Pincolini and J. Pincolini

for a new trial on their behalf upon the following grounds, and in this, to wit:

1. That the verdict so rendered herein against said D. Pincolini is contrary to the law of the case.

2. That the verdict rendered herein against said J. Pincolini is contrary to the law of the case.

3. That the verdict so rendered against said D. Pincolini is not supported by the evidence in and to the degree required by law.

4. That the verdict so rendered against said J. Pincolini [37] is not supported by the evidence in and to the degree required by law.

5. That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said D. Pincolini.

6. That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said J. Pincolini.

7. Errors in law occurring at the trial and excepted to by the defendants, D. Pincolini and J. Pincolini, and each of them, which prejudiced each of said defendants herein named, and prevented them from having a fair and impartial trial.

8. That the fourth count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the offense charged therein.

9. Irregularities in the proceedings of said court and jury, and each of them, by which said D. Pincolini and said J. Pincolini were, and each of them



was, prevented from having a fair trial, as shown by the affidavit on motion for a new trial.

10. That the Court improperly instructed the jury to the prejudice of said defendants, D. Pincolini and J. Pincolini, and each of them, in this to wit:

(a) That the Court instructed the jury in effect that there was sufficient evidence on the third count of the indictment, to wit, the charge that said defendants made sales of intoxicating liquor in violation of law, as charged in the indictment, and thereby exceeded the province of the court and its jurisdiction and authority and invaded the province of the jury, in using the following language: [38]

“There has been an abundance of evidence on the third count in the indictment, of making sales.”

(b) In giving this instruction or using this language relating to testimony given by witnesses Scott and Hogue of sales made to them:

“If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on those days,”

in that it is too broad a statement of the law in its scope, and applies, as given, to all the defendants and is not limited, as to its effect and what it shows, to the defendants who these witnesses testified made these particular sales and those shown to have been acting in concert with them or in aid of them, and also in that it invades the province of

the jury in stating the effect this testimony must be given.

(c) In giving this instruction relating to the proof of possession of intoxicating liquor and the necessity of proving actual possession and knowledge of possession by each of the defendants:

“If each knew that the intoxicating liquor was there, and it was kept there with his knowledge, and they were engaged in the business, the possession of one would be the possession of the other,”

in that this instruction, as given, is not limited to a situation or condition where defendants had been proven to have been engaged in the business together and jointly, but the instruction should have contained the element of joint business or business in which the defendants concerned in the transaction were jointly engaged.

(d) In not including these words, “as to what the law is,” or words of similar import, after the word, “instructions,” in the following instruction:  
[39]

“You are bound to submit these matters of fact to your own conscience and to your own judgment, under the instructions, and a true verdict render,”

in that and for the reason that the jury might have deemed that the instruction referred to in this language applied and referred to instructions or comments of the Court as to matters of fact and to references made by the Court to the testimony in commenting on it and on what it showed and as

to its abundance or sufficiency, as in this paragraph of this motion shown, such as the comment of the Court that if certain testimony be true "it shows that defendants were engaged in that place in selling liquor," and such as the comment of the Court when it stated, "There has been an abundance of evidence on the third count in the indictment, of making sales."

(e) In summing up the testimony and applying it to the various charges in the indictment, and in commenting on it and its effect, and more particularly in this comment and question put to the jury for its consideration:

"Isn't it rather a significant circumstance that this man only went up there on the 29th day of July, it was the first time he had ever had that room, that he only stayed there until the raid was made, then disappears from the house and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming."

(f) In calling the attention of the jury to the interest of the defendants in the case and in suggesting as an inducement for them to testify as they did in the case an attempt to shield themselves from the consequences of a violation of the law in the use of the following language, in instructing the jury as to what elements they should take into consideration in weighing the testimony in this case:

“Whether it is an attempt on his part to shield himself from the consequences of a violation of the law,” [40]

without at the same time calling the attention of the jury to the interest that the prohibition officers might have had in the case, to wit, their anxiety to justify their conduct in making the raid and to procure a conviction upon the indictment which they had secured.

11. That the second count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the offense charged therein.

#### XIV.

That the Trial Court erred in denying the motion of said defendants D. Pincolini and J. Pincolini in arrest of judgment on their, and each of their, behalf, upon the following grounds, and in this, to wit:

1. That the fourth count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense in violation of Section 21, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

2. That the second count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.



3. That the third count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition [41] Act.

4. That the following irregularity, omission or defect appears from the record, or should appear from the record, of the proceedings had at the trial of said cause and during said trial, outside of the evidence:

That after the jury in said action had been duly impanelled and sworn to try said cause, to wit, during the afternoon of the second day of said trial and at the close of the testimony of witness Thomas Scott and at the time counsel for the Government announced that the Government rested, the Court excused the jury and allowed it to leave the courtroom without giving the jury the usual admonition for said jurors not to discuss the case among themselves or with any other person, and without admonishing it as to any other matters contained in the usual admonition to a jury when excusing it and allowing it to leave the courtroom or to separate.

5. That the evidence adduced and presented to the court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said D. Pincolini as charged in either the second count of said indictment or in the third

count of said indictment or in the fourth count of said indictment.

6. That the evidence adduced and presented to the court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said J. Pincolini as charged in either the second count of said indictment or in the third count of said indictment or in the fourth count of said indictment.

McCARRAN & MASHBURN,  
Attorneys for Defendants D. Pincolini and J. Pincolini. [42]

Service of the foregoing assignment of errors of D. Pincolini and J. Pincolini by copy admitted this  
— day of January, 1923.

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Attorney for Plaintiff.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini, and Susie Pincolini, Defendants. Assignment of Errors of Defendants D. Pincolini and J. Pincolini. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [43]

In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Petition for Writ of Error.**

To the Honorable E. S. FARRINGTON, Judge of  
the Above-entitled Court:

COME NOW D. Pincolini and J. Pincolini, the  
only two of the above-named defendants against  
whom verdicts of guilty were rendered in said  
cause, and each of them, by their attorneys, Mc-  
Carran & Mashburn, and say, and each of them  
says, that on the 18th day of January, 1923, the  
above-entitled court entered judgment herein  
against each of said defendants, in which judgment  
against each of said defendants, petitioners herein,  
and the proceedings had prior thereto in this cause,  
certain errors were committed, to the prejudice of  
said defendants, and each of them, so petitioning  
said Court, all of which *are more particularly ap-  
pear* from the assignment of errors which is filed,  
or is about to be filed, with this petition.

WHEREFORE, said defendants D. Pincolini and  
J. Pincolini, petitioners herein, pray, and each of  
them prays, that a writ of error may issue in their

behalf, and in behalf of each of them, out of the United States Circuit Court of Appeals for the Ninth [44] Circuit for the correction of the error so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit.

D. PINCOLINI.

J. PINCOLINI.

McCARRAN & MASHBURN,

Attorneys for Defendants D. Pincolini and  
J. Pincolini.

Service of the foregoing petition for writ of error by copy admitted this — day of January, A. D. 1923.

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Attorney for Plaintiff.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini, and Susie Pincolini, Defendants. Petition for Writ of Error. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [45]



In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Order Allowing Writ of Error.**

On this 18th day of January, A. D. 1923, came the defendants, D. Pincolini and J. Pincolini, by their attorneys McCarran & Mashburn, and filed herein and presented to the Court their petition praying for the allowance of a writ of error and assignment of errors intended to be used by them, praying also that a transcript of the record, testimony, exhibits, stipulations, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendants, D. Pincolini and J. Pincolini, each giving a bond according to law in the sum of Four Thousand Dollars (\$4,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendants shall be and they are hereby ordered to be released from custody.

Done in open court this 18th day of January,  
A. D. 1923.

E. S. FARRINGTON,  
District Judge.

[Endorsed]: No. 5663. In the District Court of  
the United States, in and for the District of Nevada.  
United States of America, Plaintiff, vs. A. Pin-  
colini, D. Pincolini, J. Pincolini and Susie Pin-  
colini, Defendants. Order Allowing Writ of Error.  
Filed January 18th, 1923. E. O. Patterson, Clerk.  
[46]

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In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,  
Defendants.

**Bail Bond of J. Pincolini on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, J. Pincolini, of the County of Washoe,  
State of Nevada, as principal, and Edward Vacchini  
and Louis Avanzino, both of Reno, County of  
Washoe, State of Nevada, as sureties, are held  
and firmly bound unto the United States of  
America, in the full and just sum of Four Thousand  
Dollars (\$4,000.00), gold coin of the United States  
of America, to which payment well and truly to be

made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of January, in the year of our Lord, one thousand nine hundred and twenty-three.

WHEREAS, lately on the 18th day of January, A. D. 1923, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, Plaintiff, and A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants, a judgment and sentence was rendered against said defendant J. Pincolini, to wit:

The said J. Pincolini to be fined in the sum of Five Hundred Dollars (\$500.00), and to serve five (5) months in the county jail of Washoe County, State of Nevada, together with [47] costs of suit; and

WHEREAS, the said J. Pincolini obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court in and for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the said United States of America to be and appear in said court thirty (30) days from and after the date thereof, which citation has been fully served.

NOW, THE CONDITION of said obligation is such that if said J. Pincolini shall prosecute said

writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument, or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made in said Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States in and for the District of Nevada on such days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the said United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

J. PINCOLINI.

EDWARD VACCHINA.

LOUIS AVANZINO. [48]

State of Nevada,

County of Ormsby,—ss.

Edward Vacchina and Louis Avanzino, sureties on the annexed foregoing undertaking, being each first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Washoe, State of Nevada; and that he is worth the sum of Four



Thousand Dollars (\$4,000.00) over and above all his just debts and liabilities, in property not exempt from execution.

EDWARD VACCHINA.

LOUIS AVANZINO.

Subscribed and sworn to before me this 18th day of January, A. D. 1923.

[Seal]

E. O. PATTERSON,

Clerk of the United States District Court, in and for the District of Nevada.

Approved:

CHAS. A. CANTWELL,

Asst. United States Attorney.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Bail Bond on Writ of Error of J. Pincolini. Filed January 18th, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants. [49]

In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Bail Bond of D. Pincolini on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:

That we, D. Pincolini, of the County of Washoe, State of Nevada, as principal, and Edward Vacchini and Louis Avanzino, both of Reno, County of Washoe, State of Nevada, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Four Thousand Dollars (\$4,000.00), gold coin of the United States of America, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of January, in the year of our Lord, one thousand nine hundred and twenty-three.

WHEREAS, lately on the 18th day of January, A. D. 1923, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, Plaintiff, and A. Pincolini, D.

Pincolini, J. Pincolini and Susie Pincolini, Defendants, a judgment and sentence was rendered against said defendant, D. Pincolini, to wit:

The said D. Pincolini to be fined in the sum of Five Hundred Dollars (\$500.00), and to serve five (5) months in the [50] county jail of Washoe County, State of Nevada, together with costs of suit; and

WHEREAS, the said D. Pincolini obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court, in and for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the said United States of America to be and appear in said court thirty (30) days from and after the date thereof, which citation has been fully served.

NOW, THE CONDITION of said obligation is such that if said D. Pincolini shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument, or when required by law or rule of said court, and from day to day thereafter in said Court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made in said Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him

shall be affirmed, and if he shall appear for trial in the District Court of the United States, in and for the District of Nevada on such days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the said United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

D. PINCOLINI.

EDWARD VACCHINA.

LOUIS AVANZINO. [51]

State of Nevada,  
County of Ormsby,—ss.

Edward Vacchini and Louis Avanzino, sureties on the annexed foregoing undertaking, being each first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Washoe, State of Nevada, and that he is worth the sum of Four Thousand Dollars (\$4,000.00) over and above all his just debts and liabilities, in property not exempt from execution.

EDWARD VACCHINA.

LOUIS AVANZINO.

Subscribed and sworn to before me this 18th day of January, A. D. 1923.

[Seal]

E. O. PATTERSON,  
Clerk of the United States District Court, in and  
for the District of Nevada.



Approved:

CHAS. A. CANTWELL,  
Asst. United States Attorney.  
E. S. FARRINGTON,  
District Judge.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Bail Bond of D. Pincolini on Writ of Error. Filed January 18th, 1923. E. O. Patterson, Clerk. [52]

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In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Cost Bond on Writ of Error.**

WHEREAS, the defendants in the above-entitled action, D. Pincolini and J. Pincolini, have sued out a writ of error through the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Nevada, from a judgment made and entered against them, and each of them, in the above-entitled cause in the United States District Court for the District

of Nevada on the 18th day of January, 1923, or thereabouts; and

WHEREAS, the said defendants, by an order of court heretofore duly made and entered, are required to enter into a bond in the sum of Five Hundred (500.00) Dollars to guarantee the payment of all costs in said cause.

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said United States Circuit Court of Appeals for the Ninth District of the United States, we, the undersigned, residents of the County of Washoe, State of Nevada, do hereby jointly and severally undertake and promise on the part of said D. Pincolini and J. Pincolini, and [53] each of them, that they, the said D. Pincolini and J. Pincolini, will pay all damages and costs which may be awarded against them, or either of them, on account of the said writ of error or on the dismissal thereof, not exceeding the sum of Five Hundred (500.00) Dollars, in which amount we acknowledge ourselves jointly and severally bound.

WITNESS our signature this 18th day of January, A. D. 1923.

EDWARD VACCHINA.  
LOUIS AVANZINO.

State of Nevada,  
County of Washoe,—ss.

Edward Vacchini and Louis Avanzino, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Washoe, State of Ne-

vada, and is the identical person who signed the above and foregoing bond and undertaking; and that he is worth the sum of Five Hundred (500.00) Dollars over and above all indebtedness and in property subject to execution.

EDWARD VACCHINA.

LOUIS AVANZINO.

Subscribed and sworn to before me this 18th day of January, A. D. 1923.

[Seal]

GRAY MASHBURN,

Notary Public in and for the County of Washoe,  
State of Nevada.

The foregoing bond is hereby approved:

CHAS. A. CANTWELL,

Asst. United States Attorney.

E. S. FARRINGTON,

Judge. [54]

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Cost Bond on Writ of Error. Filed Jany. 18, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants. [55]

In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Praeipce for Transcript of Record.**

To E. O. Patterson, Clerk of the United States Dis-  
trict Court, Carson City, Nevada:

Request is hereby made of you that you have  
prepared a praeipce of the papers and records in  
the above-entitled cause as follows:

The indictment.

Verdict.

Motion for new trial and affidavit in support thereof.

Motion in arrest of judgment.

Sentence and judgment.

Petition for writ of error.

Assignment of errors.

Citation to writ of error.

Writ of error.

Bail and supersedeas bond of D. Pincolini.

Bail and supersedeas bond of J. Pincolini.

Cost bond.

Affidavit of service of writ of error, and [56]  
bill of exceptions.

Together with endorsements thereon.



Dated January 20, 1923.

McCARRAN & MASHBURN,  
Attorneys for Defendants D. Pincolini and J. Pincolini.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Praeipie for Transcript of Record. Filed Jany. 22, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [57]

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In the District Court of the United States in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Affidavit of Service of Citation to Writ of Error.**

State of Nevada,

County of Washoe,—ss.

Gray Mashburn, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the above-named defendants; that on the 20th day of January, 1923, he personally delivered a copy of the citation to writ of error issued and filed

herein on the 18th day of January, 1923, to George Springmeyer, Esq., United States Attorney for the District of Nevada, at his office in Reno, Nevada.

GRAY MASHBURN.

Subscribed and sworn to before me this 23d day of January, 1923.

[Seal]

P. A. McCARRAN,

Notary Public in and for the County of Washoe,  
State of Nevada.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Affidavit of Service of Citation to Writ of Error. Filed Jany. 24, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [58]

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In the District Court of the United States in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Affidavit of Service of Writ of Error.**

State of Nevada,  
County of Washoe,—ss.

Gray Mashburn, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the above-named defendants; that on the 20th day of January, 1923, he personally delivered a copy of the writ of error signed and filed herein on the 18th day of January, 1923, to George Springmeyer, Esq., United States Attorney for the District of Nevada, at his office in Reno, Nevada.

GRAY MASHBURN.

Subscribed and sworn to before me this 23d day of January, 1923.

[Seal]

P. A. McCARRAN,

Notary Public in and for the County of Washoe,  
State of Nevada.

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Affidavit of Service of Writ of Error. Filed Jany. 24, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [59]

In the District Court of the United States in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Order Extending Time to and Including February  
28, 1923, to File Bill of Exceptions.**

It appearing to the satisfaction of the Court that the time allowed the above defendants, D. Pincolini and J. Pincolini, within which to present and have their bill of exceptions settled in the above-entitled case is about to expire and will expire on the 18th day of February, 1923, and good cause appearing therefor,—

Now, therefore, upon motion of Messrs. McCarran & Mashburn, attorneys for said defendants,—

IT IS HEREBY ORDERED that said defendants, D. Pincolini and J. Pincolini, have to and including the 28th day of February, 1923, within which to present to the court for settlement and have settled their bill of exceptions in said case, and their time therefor is hereby extended accordingly.

Dated February 19th, 1923.

E. S. FARRINGTON,

Judge.

[Endorsed]: No. 5663. In the District Court of the United States of America, in and for the Dis-



trict of Nevada. United States of American, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Order Extending Time for Bill of Exceptions. Filed Feb. 19, 1923. E. O. Patterson, Clerk. [60]

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In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Bill of Exceptions.**

BE IT REMEMBERED, that, during the trial of the above-entitled cause, and while THOMAS SCOTT, a witness called by and who was then testifying in behalf of the plaintiff herein, was being cross-examined, the following questions were asked him by counsel for defendants, to which counsel for plaintiff made the following objection, and on which the Court made the following ruling and comment, and the following proceedings were had, and to which the following exception was taken by defendants:

**Testimony of Thomas Scott, for Plaintiff.**

“Q. I will ask you whether at that time you were representing yourself to be an insurance agent?

A. Absolutely, no.

Q. Did you ever about that time?

A. Not in Reno.

Q. Well, you did at other places, did you?

A. I did.

The COURT.—Is it necessary to go into that? This examination is taking a long time, I want to get through to-morrow.

Mr. FRAME.—(Q.) Well, do you recall whether you made any representations about the 6th of April as to being an insurance agent? A. No.

Q. And did you ever have any authority to act as insurance agent?

The COURT.—It don't seem to me it is necessary to go into that. If you have any point in it that is legitimate, you can do so; if you propose to put in evidence that he represented himself as an insurance agent, that is one matter; but unless you do I don't think this is material. If it is material you can go into it, but I don't see [61] where it is material.

Mr. FRAME.—It is merely a matter affecting the general credibility of this witness. I would like the record to show that the question is asked for the purpose of affecting the credibility of the witness.

The COURT.—Very well, ask your question.

Mr. FRAME.—Well, I will ask this question for the purpose of permitting the Court to rule. (Q.) Since you have been a prohibition agent, have you ever represented yourself to be an insurance agent?

Mr. CANTWELL.—We object to the question as incompetent, irrelevant and immaterial to any purpose in this case, unless it is accompanied by an offer to prove representations made in connection with this case, or with the purchases this witness has made from these defendants, or some of them.

The COURT.—Objection sustained. If you propose to offer proof to show that your clients were misled in any way in this case, it will be admitted; otherwise it will not.

Mr. FRAME.—It is offered for the purpose of showing the general acts and conduct of this witness since he has been a prohibition agent, for the purpose of affecting his general reputation, and for the purpose of affecting his credibility as a witness in this case, and testing his reliability, and offered as a circumstance to go to the jury.

The COURT.—You may have an exception. It is overruled because it seems to me it is utterly irrelevant, and wasting time."

BE IT FURTHER REMEMBERED, that at the end of plaintiff's case in chief and immediately after counsel for plaintiff had announced that the Government rested, the defendants hereinafter specified moved the Court as follows, on which motion the Court made the following ruling and the follow-

ing proceedings were had, and to which ruling the said defendants excepted as follows:

“Mr. CANTWELL.—The Government rests.

Mr. FRAME.—If the Court please, if the jury might be excused for a few minutes, there are some matters we desire to bring to the attention of the Court in the absence of the jury.

The COURT.—You may be excused for a few minutes, gentlemen. Don't go very far away, so you will be within reach when the Marshal calls you.

(The jury retires at 1:55 P. M.)

Mr. FRAME.—If it please the Court, the defendants, Joe Pincolini, A. Pincolini and Dante Pincolini, each now moves the Court to instruct the jury that the evidence in this case is wholly insufficient to justify a conviction for the offense of conspiracy, upon the ground that the evidence neither proves nor tends to prove any unlawful [62] combination, either established expressly or inferably from any competent evidence of the facts and circumstances offered in this case. Upon the further ground, that any offense committed, if any has been shown to have been committed, does not in law constitute the offense of conspiracy; that no concerted action in respect to any transaction, or overt act, has been established by any legal or competent evidence in this case.

The defendant Susie Pincolini separately moves the Court to direct a verdict of not guilty in this case, upon the ground that there is no legal or com-



petent evidence proving or tending to prove her participation in any unlawful transaction which would constitute a conspiracy, or any overt act committed by her, or any act from which it could be inferred that this defendant has been guilty of a conspiracy, or knowingly and willingly engaged in any unlawful act which would amount to an overt act; or was a party to any combination, understanding or agreement, either express or implied, to violate the prohibitory law. And upon the further ground that there is no proof, or any legal or competent evidence to show this was a nuisance; that is, the keeping of liquors for sale, the sale of intoxicating liquor, or the knowing and wilful possession of intoxicating liquor by her, in violation of law; and that she is a married woman, and the wife of one of the defendants, and there would be a presumption that any act committed by her would be under coercion, and not her voluntary act.

The COURT.—The motion will be overruled. You may call the jury.

Mr. FRAME.—I presume the record may show that an exception is taken upon all the grounds stated?

The COURT.—Certainly.

The jury returned into court at 2.05 P. M. The recess just taken by the jury being the fifth recess by them taken since they were impanelled and sworn in this cause.”

BE IT FURTHER REMEMBERED, that, while JAMES BOYD, a witness who was called by and

(Testimony of James Boyd.)

testified in behalf of defendants, was being cross-examined, the following questions were asked him, to which defendants made the following objection, on which the Court ruled as follows, and to which ruling the defendants excepted as hereinafter specified:

**Testimony of James Boyd, for Defendants (Cross-examination).**

“Q. I presume you broke these bottles that day because you realized you were breaking the law, that you had intoxicating liquor in your possession?

A. I will tell you why I broke them; I broke them to protect the house as well as myself, for I had it there in the rooms; that is why I tried to destroy it.

Q. You realized somebody needed protection at that time, did you?

A. Well, I realized I needed it, in a way, you understand.

Q. You realized you were breaking the law, didn't you?

A. Not at that time I didn't know; I just didn't know only to destroy that stuff, that is all; that is all I thought about; not only to protect myself but to protect [63] the house, because I had it there unbeknownst to them people.

Q. Did you think at that time you had a perfect right to have that kind of liquor in your possession?

A. I didn't think much about it.

Q. You never had heard of the prohibition law, had you?     A. Yes, sir.

(Testimony of James Boyd.)

Q. Never had heard that the prohibition law prohibits your having moonshine whisky in your possession? A. Oh, yes.

Q. You did know that your possession of that liquor was unlawful, didn't you?

A. Well, it must have been.

Q. And you know now when you are giving your testimony that you are making an admission that you yourself have broken the prohibition law, do you not? A. I suppose I have.

Q. Do you realize right now that if we had the Marshal put you under arrest on the charge of having possessed liquor on that day, there would be nothing for you to do but enter a plea of guilty? I am getting at his state of mind.

Mr. SALTER.—Objected to: he is not presumed to know the law in this case, or what would happen to him.

The COURT.—I will overrule the objection.

Mr. SALTER.—Exception.

The COURT.—Note the exception.

(By direction the reporter reads the question.)

The COURT.—Can you answer that question?

A. I say it is no time. I don't think, I haven't been—I am not being tried for any offense; I don't see why I have any right to answer that question.

(No other or further answer was given by the witness, requested by counsel, or directed by the Court to be made, and the examination of the witness proceeded along other lines.)

(Testimony of J. P. Donnelly.)

BE IT FURTHER REMEMBERED, that, while J. P. DONNELLY, a witness called in rebuttal by plaintiff, was testifying on direct examination, the following questions were asked him, the following objections thereto made by defendants, the following rulings and comment made by the Court, and the following exceptions taken and motion made by defendants:

**Testimony of J. P. Donnelly, for Plaintiff (In Rebuttal).**

“Q. Calling your attention to the 2d day of August, 1922, do you remember seeing Mr. Hogue in your office in the Clay Peters Building in Reno?

A. Yes, sir.

Q. At what time was he there?

Mr. FRAME.—If the Court please, we object at this time on the ground that this testimony apparently relates to a matter that if relevant, competent or material at all in this case, would be a part of the Government’s case in chief, and is not rebuttal; and for that reason we object.

The COURT.—I think I can see clearly where it will be rebuttal; if it is not in rebuttal we will see about it later.

Mr. CANTWELL.—(Q.) Do you remember what time, Captain Donnelley, that Mr. Hogue arrived at the office, or if you were there at the time of his arrival on August 2d?

A. He was there when I arrived shortly after one o’clock.



(Testimony of J. P. Donnelly.)

Q. Shortly after one o'clock in the afternoon?

A. Yes, sir. [64]

Q. Was his presence there at that time due to a request which had been made by you before that?

A. It was.

Q. Were you present from that time up to the hour of 3 o'clock, say, in the office? A. I was.

Q. Remained there all the time? A. I did.

Q. Were you present during the planning of the raid which was made that day on the Mizpah?

A. I was.

Q. Were you present at this search and marking of the money there? A. Yes, sir.

Q. Did you see that search made? A. I did.

Q. Did you see the delivery of the marked money?

A. I did.

Q. Were you there at the time Mr. Hogue and the prohibition officers left for the purpose of going to the Mizpah? A. Yes, sir.

Mr. FRAME.—I again renew the objection upon the ground that every word of this testimony, every question and every answer, is a matter that has already been presented in the case in chief, and it is properly a part of the case in chief, and is not rebuttal of anything; and we now move that the questions and answers already given be stricken out as not being rebuttal; and object to the questions propounded on the ground it is not rebuttal.

The COURT.—Objection overruled.

Mr. SALTER.—We ask an exception, if the Court please.

A. I was.

(Testimony of J. P. Donnelly.)

Mr. CANTWELL.—Q. About what time of the afternoon was that?

Same objection, ruling and exception.

WITNESS.—When they left the office?

Q. Yes. A. About 3 o'clock.

Q. Now between the time you arrived there shortly after one, and the time that Mr. Hogue left there with the prohibition officers about 3 o'clock, was Mr. Hogue there in the Federal Prohibition office with you all the time? A. He was.

Q. Did you see Hogue later that afternoon?

A. I did.

Q. Do you remember what time it was?

A. It was between half-past three and four o'clock, I should say about a quarter of four.

Q. At the prohibition office, was it?

A. At the prohibition office, my office.

Q. At that time did he return anything to you?

A. He did.

Q. What? A. Two dollars, two silver dollars.

Same objection, ruling and exception.

Q. Two silver dollars, you say? A. Yes, sir.

Q. Had you seen those silver dollars before?

A. I had.

Same objection, ruling and exception.

Q. Did you identify those two silver dollars as being among the coins that you had seen before?

A. Yes, sir.

Mr. FRAME.—Objected to as a conclusion, and incompetent, irrelevant and immaterial.

The COURT.—Well, if it is a conclusion he can

(Testimony of J. P. Donnelly.)

state how he knows they were the same silver dollars, if you wish it done that way.

Mr. FRAME.—I am objecting to all of this as not rebuttal.

The COURT.—Well, I have ruled it is admissible because I think it is rebuttal; and in any event it is within the [65] *the* discretion of the Court, if he feels it is proper, to reopen the case and allow further testimony to come in; but it seems to me this is very clearly rebuttal of some things that you have put in in defense. Proceed.

Mr. CANTWELL.—I asked you if you did identify those two silver dollars which were returned to you, as having been silver coins which you had seen before? A. I did.

Q. And just what coins were they?

A. They were two silver dollars that were marked that we had given Mr. Hogue to purchase the evidence.

The COURT.—That perhaps is your case in chief, but he certainly is at liberty to tell the markings that he saw on these dollars when they came back.

Mr. CANTWELL.—I presumed the question was properly rebuttal, for he testified that Mr. Hogue had brought back and delivered to him two of these particular silver coins which had been earlier in the afternoon given to him, and that he was able to identify them positively as being among those coins.

The COURT.—That is within the ruling; but what occurred there in the morning, or what occurred at 3 o'clock, or just before 3 o'clock, when

(Testimony of J. P. Donnelly.)

the witness went out, I don't care to have him go through the details; but he can tell how he identifies that money as money which he saw this man receive before.

Mr. CANTWELL.—Let me reframe my question in the form suggested by the Court.

Q. By what means did you identify these two silver coins which were returned to you by Mr. Hogue as being among those given to him theretofore that afternoon?

Mr. FRAME.—Objected to as not rebuttal of any testimony offered by the defendants.

The COURT.—I will say it seems to me this is very clearly rebuttal testimony of that which was given by Mr. McCaffrey; and the Government had no knowledge that Mr. McCaffrey was going to testify as to what occurred in the lobby. Mr. McCaffrey said that this man came into the lobby, and gave Dante Pincolini something, and he received a bill of exchange, and that this occurred at half-past one or two o'clock. I think this is properly in rebuttal of that testimony. If this testimony is true there is something wrong with the other testimony; and if the other testimony is true there is something wrong with Captain Donnelley's testimony. I can't see why it is not rebuttal testimony.

Mr. FRAME.—May the record show we have the benefit of the same objection and exception to this, and all similar testimony?

The COURT.—Certainly, you may have an exception; and if you have any further objection you



(Testimony of J. P. Donnelly.)

wish to urge to this, urge it now; and if you think of anything further before the case is finished, you can urge it then, and I will consider it.

Mr. SALTER.—Our position furthermore is, that other witnesses in the case in chief have testified as to the time that this occurrence took place in Captain Donnelley's office.

The COURT.—I don't know that there is a single witness who testified that this man Hogue was in that office [66] from one o'clock until three o'clock, and that he left at that time. If there is, I would like to have you call my attention to it.

Mr. SALTER.—My idea of it was that Mr. Nash testified that this money was given to him, and fixed the time up there at that time; and I believe also that Mr. Dubois testified to that.

The COURT.—According to their testimony, I think it was given to him about 3 o'clock.

Mr. SALTER.—I think Mr. Nash said about two-thirty.

The COURT.—Then there is all the more reason why this should go in. But at any rate, it is rebuttal of that testimony as to what occurred between the witnesses McCaffrey and Dante Pincolini between half-past one o'clock and two o'clock. You may go on.

Mr. CANTWELL.—(Q.) By what means did you identify those coins?

A. By a mark on the throat of the eagle.

Mr. CANTWELL.—You may take the witness.

Mr. FRAME.—There is no cross-examination.

(Testimony of Jonathan Payne.)

Now for the purpose of the record we move to strike all the testimony of Captain Donnelley as not rebuttal, and incompetent, irrelevant and immaterial to anything in the case.

The COURT.—It will be the same ruling and the same exception as you have had before.”

BE IT FURTHER REMEMBERED, that, while Jonathan Payne, P. Nash, A. Carter, P. E. DuBois and Thomas Scott, witnesses called in rebuttal by plaintiff, were testifying on direct examination, the following questions were asked each of them as hereinafter indicated, the following objections made by defendants thereto, the following rulings and comment made by the Court thereon, and the following exceptions taken by defendants:

**Testimony of Jonathan Payne, for Plaintiff (In Rebuttal).**

“Q. Do you recall at what time you returned to the office after lunch that day?

A. About one o'clock.

Q. Were you in the office all the time from one o'clock that afternoon, to say four o'clock that afternoon? A. I was there all afternoon.

Q. During any of this period of time did you see Mr. Hogue there, Mr. R. L. Hogue?

Mr. SALTER.—If the Court please, we desire to object to all of this line of testimony on the same ground as stated in the objection to Captain Donnelley's testimony. We anticipate this will be the same.

(Testimony of Jonathan Payne.)

The COURT.—It will be the same ruling and exception.

Mr. CANTWELL.—Might we save some time by now stipulating that all testimony of this character given in rebuttal may come in subject to that same objection, ruling and exception?

Mr. FRAME.—It will be satisfactory to us, so as to [67] save time.

The COURT.—Very well. If there is anything new, however, I expect you to raise an objection to that. This only covers such testimony as Captain Donnelley gave.

Mr. FRAME.—Yes.

Mr. CANTWELL.—(Q.) Did you see R. L. Hogue there in the office during any of this time?

A. I did.

Q. During what portion of that time was Mr. Hogue there in the office?

A. Mr. Hogue, I think met me in the hall as I came back from lunch about one o'clock, and he was there up to the time he went out to make this purchase at the Mizpah, and he came back again after that somewhere around four o'clock.

Q. What time would you say it was that he left for the purpose of making the purchase?

A. In the neighborhood of three, probably a few minutes after three.

Q. And you are positive that during all this time, from two o'clock until about three o'clock, when he left for that purpose, he was there in the office all the time?

(Testimony of Jonathan Payne.)

A. He was there all the time.

Q. When he returned to the office later that afternoon, did you see him surrender any thing to Captain Donnelley?

A. Mr. Hogue came back somewhere between, I think somewhere between 3:45 and 4:15, and gave Mr. Donnelley two silver dollars as the balance that was left from what had previously been given him."

**Testimony of P. Nash, for Plaintiff (In Rebuttal).**

"Mr. CANTWELL.—(Q.) You have heretofore testified, Mr. Nash, that on the afternoon of August 2d you were in the prohibition office, and that after giving Mr. Hogue some marked money you all left to go to the Mizpah at about three o'clock, I believe is your testimony? A. Yes, sir.

Q. For how long a period of time had you been in the prohibition office that afternoon?

Mr. SALTER.—We desire to urge the same objection.

Mr. CANTWELL.—Well, it was stipulated.

Mr. SALTER.—As to this witness, too?

Mr. CANTWELL.—As to all witnesses, this same line of testimony.

A. I got there shortly before two o'clock, and I was the last one in the office; the Captain phoned to me at my house.

Q. From the time you entered the office about



(Testimony of A. Carter.)

two o'clock until you all left with Hogue, was Hogue there in the prohibition office all the time?

A. He was."

**Testimony of A. Carter, for Plaintiff (In Rebuttal).**

"Mr. CANTWELL.—(Q.) Mr. Carter, calling your attention to the 2d day of August, I believe you have heretofore testified that about three o'clock that afternoon, after certain matters had transpired in the prohibition office, a bunch of you prohibition officers left the prohibition office with Mr. Hogue to go to the Mizpah Hotel, do you recall that testimony? A. I do. [68]

Q. Do you remember at what time you came to the prohibition office that afternoon? A. I do.

Q. At what time? A. About one o'clock.

Q. Did you remain in the prohibition office from the time that you arrived there about one o'clock until you prohibition officers left with Mr. Hogue at about three o'clock? A. I did.

Q. All the time? A. Yes, sir.

Q. What part of that time, if you know, was Hogue there in the office?

A. Hogue was there all the time.

Q. Was Hogue there when you arrived that afternoon? A. Yes, sir.

Q. Are you positive that he was not out of the prohibition office from the time that you arrived there until the whole bunch of you left about three o'clock? A. Yes, sir."

**Testimony of P. E. DuBois, for Plaintiff (In Rebuttal).**

“Mr. CANTWELL.—(Q.) Mr. DuBois, do you remember at what time of the day you arrived at the prohibition office in the Clay Peters Building that afternoon of August 2d, 1922?

A. One P. M.

Q. Did you remain there at the office thereafter and up to the time that you officers all left to go to the Mizpah, at about three o'clock? A. I did.

Q. Were you out of that office at all during that time? A. I was not.

Q. What part of that time, if you know, was Mr. Hogue there in the office? A. All that time.

Q. Are you positive that he did not leave the office from the time you arrived there about one o'clock until the whole bunch of you left about three o'clock to go to the Mizpah? A. Yes, sir.”

**Testimony of Thomas Scott, for Plaintiff (In Rebuttal).**

“Mr. CANTWELL.—(Q.) Mr. Scott, you testified that you were in the office of the Prohibition Director on the afternoon of August 2d; do you recall at what time you entered that office that afternoon?

A. Yes, sir, I came in at one-thirty P. M., went out and was gone about an hour, and came back again.

Q. You went out for about an hour after one-thirty? A. Yes, just stayed a moment.

(Testimony of Joe Pincolini.)

Q. And came back about two-thirty?

A. Yes, sir."

BE IT FURTHER REMEMBERED, that, while JOE PINCOLINI, a witness on behalf of defendants, who was, with the consent of the defendants, recalled by plaintiff for further cross-examination, was testifying on such further cross-examination, the following question was asked him, to which the following objection was made, on which the Court made the following ruling and comment, and to which ruling the following exception was taken:

**Testimony of Joe Pincolini, for Plaintiff (Recalled  
—Cross-examination).**

"Mr. CANTWELL.—(Q.) Mr. Pincolini, you have testified to some things which happened on February 18th, 1922—at your place, the day when the officers, I believe, searched your place; do you recall that as being the date?

A. Yes, sir—well, I don't remember the date.

Q. Well, along about that time?

A. Along about that time, yes, sir.

Q. Now calling your attention to that particular day, whenever it was, that the officers were there and searched, do you recall having had a conversation with officers Brown and [69] Nash that day there in the vicinity of the Mizpah Hotel, in which you said to them, in substance at least, 'Well, you didn't find anything did you?' to which Mr. Nash replied in substance, 'No, but we found plenty of indications in the back room and cellars,

(Testimony of Joe Pincolini.)

I guess you will not deny that you had it there, you will surely get caught if you keep it up,' and to which you replied, 'Well, I don't consider that it is committing a crime to sell liquors, and will keep on selling as long as I am out of jail,' to which Mr. Nash replied to you, in effect, 'All right, if that is the way you feel about it'? A. No, sir.

Mr. FRAME.—Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination, and not material to any issue in this case; and for the further reason if the same was competent, relevant or material for any purpose, it would be in the state's case in chief; it is not in rebuttal.

Mr. CANTWELL.—We submit that it is in rebuttal of his declaration here on his examination in chief that he never at any time sold any intoxicating liquors in that place; and this is practically an admission on his part, if it be true, that he said this, that he would keep on selling as long as he was out of jail; and we submit it is competent and relevant, and is proper cross-examination for the purpose of laying the foundation for impeachment of this witness by contrary statements.

The COURT.—Well, it seems to me if he testified that he never sold any intoxicating liquor in that place, this is proper rebuttal of that testimony. You may ask the question.

Mr. FRAME.—To which we desire an exception on the grounds stated in the objection.



The COURT.—It is my understanding when one of the defendants goes in the witness-stand and testifies that he never sold liquor, the testimony of sales other than those set out in the indictment, and that occurred about that time, are admissible as contradicting his statement. If there is a question about that we can refer to the record.

Mr. FRAME.—I think we had better do that.

(The following testimony is read by the reporter:

‘Q. I will ask you whether at any time you had any agreement with either one of the other defendants, either collectively or individually, to keep or sell, or in any way dispose of or handle intoxicating liquors, at any time mentioned by the testimony in this case?     A. No, sir.

Q. And did you either sell or assist any other person, either on the 6th of April or on the 10th of April, or on the 2d of August, or during the month of July, at any time sell or assist in selling, or consent that intoxicating liquor be either possessed, sold or kept on those premises for the purpose of sale?     A. No, sir, I never did.’ Trans., p. 241.)

The COURT.—As I understand it, you only wished to have him deny that he had violated the law in April, July and August, and didn’t wish that question to be understood as going any further. I am going to let it go just that way. I think I am making a mistake, but a mistake I make in your favor does not do any particular harm; but it does strike me when you put in that term ‘at any time’ you meant to have him deny that he had ever vio-

lated the law at any time. However, I am willing to let it go just as you say it is, that you only wanted him to deny that he violated the law at the times specified in the indictment, and of course that shuts out the rebuttal testimony on that particular point.

Mr. CANTWELL.—That is all; the Government rests, your Honor.

Mr. FRAME.—That is all. That is our case.”  
[70]

BE IT FURTHER REMEMBERED, that the Court, in charging the jury as to the common nuisance count in the indictment, discussed it in connection with the charge of conspiracy alleged therein, and, among other things, instructed the jury in the following language:

“In determining whether there was a conspiracy you are to consider all the conduct of the parties; you will consider the locked door, if you think any of the doors were locked; you will consider the conduct of Joe Pincolini with reference to this matter; you will consider the conduct of Dante and Adowaldo, and of the lady Mrs. Pincolini; and I think you would also consider the character of the establishment, the soft-drink place in front, the door and the kitchen in the rear. That is a large room, the only furniture apparently being a sink, with a drain-board and running water, a cupboard and two shelves. You should also consider the bottles; the bottle that was found in the sink and the contents of that bottle.

There is testimony that one of the milk bottles contained something smelling like alcohol. There were also a number of other bottles. One of the legs of the sink has been presented in evidence. I think it is something that should be considered by the jury in determining what that room was used for. You will notice neither end of the leg of the sink shows any nail marks; that leg has been there for a long time; it is hollow and can be taken out and put back again without destroying any nails, or any permanent fastening. The other leg is of the same character, and each leg is capable of being used to hide a bottle, perhaps several. You will also consider the sink and the running water, and the bottles there. Then I think it would be very proper for you to consider the testimony as to persons going from that back room to the door at the north, thence upstairs, if they went upstairs, and coming back with the glasses, and with liquor, if you believe that testimony.

There is no question about there being liquor in room 16. It is also a matter of significance that the liquor in that room was destroyed just at the time this raid was made, and that one of the defendants was there. If you consider the testimony of the witness Boyd, who admitted that a friend of his had taken liquor up to room 16, isn't it rather a significant circumstance that this man only went up there on the 29th day of July, it was the

first time that he had ever had that room, that he only stayed there until this raid was made, then disappears from the house, and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming. These are all matters for you to consider in determining, not only whether there was a conspiracy on the part of these defendants; but also to determine whether that was a place kept for the purpose of selling intoxicating liquor. . . .

“Mr. Scott has testified as to two purchases made in April. Mr. Hogue has testified to a sale that was made on the 2d day of August. If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on these dates. . . .

“There has been an abundance of evidence on the third count in the indictment, of making sales; and there has been a denial of those sales. As you have been informed repeatedly [71] it is your duty to accept the law as it is given you by the Court; you cannot question the law as it is given to you; you must follow the instructions of the Court. As to questions of fact, it is your duty to determine what the evidence proves, and you are to follow your own judgment, not the judgment of the Court, or the judgment of counsel, or what counsel may have said or what the Court may have said; you are bound to submit these matters of fact to your own conscience and to your



own judgment, under the instructions, and a true verdict render”;

to all of which the defendants objected in the following language:

“Mr. FRAME.—If it please the Court, we except to the portion of the Court’s charge wherein the Court summarizes and states the testimony, upon the ground that the same invades the province of the jury, and that the same is beyond the power of the Court in charging the jury as to mere matters of law”; that after said exception last quoted was by counsel for defendants stated and taken, the Court further charged the jury as follows:

“I have discussed this testimony, because it is within the province of the Judge to do so if he believes it to be his duty. It may not be so in the State courts, but it is the province and the right of a Federal Judge to discuss the testimony if he sees fit, and even to go so far as to give his opinion with reference to the case; provided he instructs the jury as I have done, that they must follow their own judgment, and that anything the Court says with reference to the facts and the evidence in the case, and the credibility of the witnesses, is a matter which can have no weight with them, except as it appeals to their judgment.”

No further exception was taken by defendants thereafter, nor was the exception taken before this renewed or restated, and the case was thereupon given to the jury.

BE IT FURTHER REMEMBERED, that thereafter the jury rendered a verdict of not guilty against the defendants A. Pincolini and Susie Pincolini, and a verdict of not guilty against said defendants D. Pincolini and J. Pincolini as charged in the first count of the indictment herein, and a verdict of guilty against said defendants D. Pincolini and J. Pincolini as charged in the second, third and fourth counts of said indictment; and that thereupon the said defendants D. Pincolini and J. Pincolini, by their counsel moved the Court for a new trial of said cause for the following reasons:

I.

“That the verdict so rendered herein against said D. Pincolini is contrary to the law of the case.

II.

That the verdict rendered herein against said J. Pincolini is contrary to the law of the case. [72]

III.

That the verdict so rendered against said D. Pincolini is not supported by the evidence in and to the degree required by law.

IV.

That the verdict so rendered against said J. Pincolini is not supported by the evidence in and to the degree required by law.

V.

That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said D. Pincolini.

## VI.

That the evidence adduced and presented to the Court and jury at the trial of said cause is, and was, insufficient to justify said verdict against said J. Pincolini.

## VII.

Errors in law occurring at the trial and excepted to by the defendants, D. Pincolini and J. Pincolini, and each of them, which prejudiced each of said defendants herein named, and prevented them from having a fair and impartial trial, a memorandum of which will be served within the time required by law.

## VIII.

That the fourth count set forth in the indictment herein fails to allege, and does not set forth, facts sufficient to constitute a public offense, and particularly the [73] offense charged therein.

## IX.

Irregularities in the proceedings of said Court and jury, and each of them, by which said D. Pincolini and said J. Pincolini were, and each of them was, prevented from having a fair trial, as shown by the affidavit attached hereto.

## X.

That the Court improperly instructed the jury to the prejudice of said defendants, D. Pincolini and J. Pincolini, and each of them, in this, to wit:

(a) That the Court instructed the jury in effect that there was sufficient evidence on the third count of the indictment, to wit, the charge that said defendants made sales of intoxicating liquor

in violation of law, as charged in the indictment, and thereby exceeded the province of the court and its jurisdiction and authority and invaded the province of the jury, in using the following language:

‘There has been an abundance of evidence on the third count in the indictment, of making sales.’

(b) In giving this instruction or using this language relating to testimony given by witnesses Scott and Hogue of sales made to them:

‘If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on those days,’

in that it is too broad a statement of the law in its scope, and applies, as given, to all the defendants and is not limited, as to its effect and what it shows, to the defendants who these witnesses testified made these particular sales and those shown to have been acting in concert with them or in aid of them, and also in that it invades the province of the jury in stating the effect this testimony must be given.

(c) In giving this instruction relating to the proof of possession of intoxicating liquor and the necessity of proving actual possession and knowledge of possession by each of the defendants:

‘If each knew that the intoxicating liquor was there, and it was kept there with his knowledge, and they were engaged in the business, the possession of one would be the possession of the other,’



in that this instruction, as given, is not limited to a situation or condition where defendants had been proven to have been engaged in the business together and jointly, but the instruction should have contained the element of joint business or business in which the defendants concerned in the transaction were jointly engaged.

(d) In not including these words, 'as to what the law is,' or words of similar import, after the word, 'instructions,' in the following instruction:

'You are bound to submit these matters of fact to your own conscience and to your own judgment, under the instructions, and a true verdict render,'

in that and for the reason that the jury might have deemed that the instruction referred to in this language applied and referred to instructions or comments of the Court as to matters of fact and to references made by the Court to the testimony in commenting on it and on what it showed [74] and as to its abundance or sufficiency, as in this paragraph of this motion shown, such as the comment of the Court that if certain testimony be true 'it shows that defendants were engaged in that place in selling liquor,' and such as the comment of the Court when it stated, 'There has been an abundance of evidence on the third count in the indictment, of making sales.'

(e) In summing up the testimony and applying it to the various charges in the indictment, and in commenting on it and its effect, and more particu-

larly in this comment and question put to the jury for its consideration:

‘Isn’t it rather a significant circumstance that this man only went up there on the 29th of July, it was the first time he had ever had that room, that he only stayed there until the raid was made, then disappeared from the house and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming.’

(f) In calling the attention of the jury to the interest of the defendants in the case and in suggesting as an inducement for them to testify as they did in the case an attempt to shield themselves from the consequences of a violation of the law in the use of the following language, in instructing the jury as to what elements they should take into consideration in weighing the testimony in this case:

‘Whether it is an attempt on his part to shield himself from the consequences of a violation of the law,’

without at the same time calling the attention of the jury to the interest that the prohibition officers might have had in the case, to wit, their anxiety to justify their conduct in making the raid and to procure a conviction upon the indictment which they had secured.

## XI.

That the second count set forth in the indictment herein fails to allege, and does not set forth,

facts sufficient to constitute a public offense, and particularly the offense charged therein.”

And thereafter the said motion for a new trial was overruled by the Court, to which action of the Court the said defendants D. Pincolini and J. Pincolini duly excepted.

BE IT FURTHER REMEMBERED, that, after the jury had rendered a verdict of guilty as charged in the second, third and fourth counts of said indictment against the defendants D. Pincolini and J. Pincolini, the said defendants D. Pincolini and J. Pincolini thereupon and at the time of the filing and presentation of their said motion for a new trial, by their counsel, file a [75] motion in arrest of judgment herein as follows:

I.

“That the fourth count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense in violation of Section 21, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

II.

That the second count set forth in said indictment and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

III.

That the third count set forth in said indictment

and verdict fails to allege and does not set forth facts sufficient to constitute a public offense, and particularly the offense charged therein, in violation of Section 3, Title 2, of the Act of Congress dated October 28, 1919, known as the National Prohibition Act.

#### IV.

That the following irregularity, omission or defect appears from the record, or should appear from the record, of the proceedings had at the trial of said cause and during said trial, outside of the evidence:

That after the jury in said action had been duly impaneled and sworn to try said cause, to wit, during the afternoon of the second day of said trial and at the close of the testimony of witness Thomas Scott and at the time counsel for the Government announced that the Government rested, the Court excused the jury and allowed it to leave the courtroom without giving the jury the usual admonition for said jurors not to discuss the case among themselves or with any other person, and without admonishing it as to any other matters contained in the usual admonition to a jury when excusing it and allowing it to leave the courtroom or to separate.

#### V.

That the evidence adduced and presented to the Court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said D. Pincolini as charged in either the second count of said indictment or in the third



count of said indictment or in the fourth count of said indictment.

## VI.

That the evidence adduced and presented to the Court and jury at the trial of said cause is and was insufficient to justify said verdict of guilty against said J. Pincolini as charged in either the second count of said indictment or in the third count of said indictment or in the fourth count of said indictment.”

And thereafter the Court denied the said motion in arrest of judgment, to which ruling of the Court the said defendants D. Pincolini and J. Pincolini then and there duly excepted. [76]

That thereupon the Court rendered its judgment and sentence upon said verdict, which judgment and sentence is, in effect, as follows:

That said D. Pincolini is sentenced to a period of five months in the county jail of Washoe County, State of Nevada, and that he pay a fine in the sum of \$500.00; and that the said J. Pincolini is sentenced to a period of five months in the county jail of Washoe County, State of Nevada, and that he pay a fine in the sum of \$500.00; the said judgment to carry the costs;

and to which judgment and sentence defendants, and each of them, then and there duly excepted.

And forasmuch as the evidence and the proceedings and the matters of exception hereinbefore set forth do not fully appear of record, the said defendants D. Pincolini and J. Pincolini, by their

attorneys, tender this bill of exceptions, and pray that the same be settled, signed and sealed by the above-entitled court pursuant to the statute in such case made and provided.

Which is done accordingly this 20th day of March, 1923.

E. S. FARRINGTON,  
Judge.

IT IS HEREBY STIPULATED AND AGREED, by and between the above-named plaintiff and defendants, through their respective counsel, that the foregoing may be settled as a bill of exceptions.

CHAS. A. CANTWELL,

Asst. United States Attorney.

McCARRAN & MASHBURN,

Attorneys for D. Pincolini and J. Pincolini. [77]

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Bill of Exceptions. Filed March 20, 1923. E. O. Patterson, Clerk. McCarran & Mashburn, Reno, Nevada, Attorneys for Defendants, D. Pincolini and J. Pincolini. [78]

In the District Court of the United States for the  
District of Nevada.

No. 5663.

UNITED STATES OF AMERICA

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record.**

United States of America,  
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants, said Case being No. 5663 on the docket of said court.

I further certify that the attached transcript, consisting of 80 typewritten pages numbered from 1 to 80 inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the

originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$35.60, has been paid to me by Messrs. McCarran & Mashburn, attorneys for the defendants in the above-entitled cause. [79]

And I further certify that the original writ of error, and the original citation, issued in this cause, are hereto attached.

WITNESS my hand and the seal of said United States District Court this 24th day of March, A. D. 1923.

[Seal] E. O. PATTERSON,  
Clerk U. S. District Court, District of Nevada.  
[80]

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In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,  
Defendants.



**Writ of Error.**

United States of America,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States in and for the District of Nevada, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants, a manifest error hath happened, to the great damage of the said defendants, D. Pincolini and J. Pincolini, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California within thirty days from date hereof, in the said [81] United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right,

and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 18th day of January, in the year of our Lord, one thousand nine hundred and twenty-three.

[Seal]

E. O. PATTERSON,  
Clerk of the United States District Court, District  
of Nevada.

Allowed by:

E. S. FARRINGTON,  
Judge. [82]

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Writ of Error. Filed January 18th, 1923. E. O. Patterson, Clerk. [83]

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In the District Court of the United States, in and  
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. PINCOLINI, D. PINCOLINI, J. PINCOLINI  
and SUSIE PINCOLINI,

Defendants.

**Citation to Writ of Error.**

To the United States of America, Defendant in Error:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, in said Circuit, within thirty days from date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Nevada, wherein D. Pincolini and J. Pincolini are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. S. FARRINGTON, U. S. District Judge in and for the District of Nevada, this 18th day of January, A. D. 1923.

E. S. FARRINGTON,  
Judge of the U. S. District Court in and for the District of Nevada.

[Seal]                      Attest: E. O. PATTERSON,

Clerk. [84]

I hereby this — day of January, A. D. 1923, accept due personal service of the foregoing citation on behalf of the United States of America, defendant in error.

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Attorney for the United States. [85]

[Endorsed]: No. 5663. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini, Defendants. Citation to Writ of Error. Filed January 18th, 1923. E. O. Patterson, Clerk.  
[86]

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[Endorsed]: No. 4000. United States Circuit Court of Appeals for the Ninth Circuit. D. Pincolini and J. Pincolini, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Received March 27, 1923.

F. D. MONCKTON,  
Clerk.

Filed April 2, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





No. 4000

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit

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D. PINCOLINI and J. PINCOLINI,	}
Plaintiffs in Error,	
Vs.	
THE UNITED STATES OF AMERICA,	}
Defendant in Error.	

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Brief for Plaintiffs in Error

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McCARRAN & MASHBURN,  
Attorneys for Plaintiffs in Error.



No. 4000

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit

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D. PINCOLINI and J. PINCOLINI,	}
Plaintiffs in Error,	
Vs.	
THE UNITED STATES OF AMERICA,	}
Defendant in Error.	

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Brief for Plaintiffs in Error

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**STATEMENT OF CASE**

Some of the above named Plaintiffs in Error were conducting a hotel situated at or near No. 214 Lake Street, Reno Nevada, on August 2, 1922, and for several months both prior and subsequent



thereto, known as and called "Mizpah Hotel." The Indictment filed in the case was against four defendants, to wit A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini. The defendant Susie Pincolini was and is the wife of J. Pincolini. There was a soft drink place, a dining hall, a kitchen, a lobby of the hotel and perhaps some other rooms on the lower floor, a stairway leading down into the basement from one of the back rooms of the building and another leading from the lobby of the hotel and the hotel proper to bedrooms upstairs. The testimony shows that the defendant A. Pincolini conducted the upstairs portion, or lodging house, of the establishment, and that neither J. Pincolini nor D. Pincolini had anything to do with that part of the business. It shows that the building was owned by the defendants J. Pincolini, D. Pincolini and A. Pincolini jointly with a brother by the name of Everesto Pincolini, the latter not being one of the defendants. It also shows that the soft drink and other part of the business which was conducted downstairs was owned by J. Pincolini. It also shows that Everesto Pincolini had nothing whatever to do with either the hotel, lodging house, soft drink business or any other business conducted in the building. It shows that the only connection D. Pincolini had with any business conducted there was his employment as night clerk for the hotel or lodging

house business, and that he occasionally cleaned up the halls upstairs and the floor of the soft drink establishment. In other words, neither defendant D. Pincolini nor defendant Susie Pincolini owned or conducted any business at that place or in that building, although Susie Pincolini was one of the chambermaids in the hotel or lodging house portion of the building.

On August 16, 1922 an Indictment was filed in the District Court of the United States in and for the District of Nevada, charging the defendants A. Pincolini, D. Pincolini, J. Pincolini and Susie Pincolini with having violated the "National Prohibition Act" on or about August 2, 1922, in said Mizpah Hotel at Reno, Nevada. The Indictment was on four counts the **FIRST COUNT** charging a conspiracy among the defendants to violate the law in the particulars charged in the Second, Third and Fourth Counts; the **SECOND COUNT** charging possession of intoxicating liquors; the **THIRD COUNT** charging the sale of intoxicating liquor; and the **FOURTH COUNT** charging the keeping for sale of intoxicating liquors, by defendants.

Upon the trial by jury defendants A. Pincolini and Susie Pincolini were acquitted on all counts charged in the Indictment; but the jury found defendants J. Pincolini and D. Pincolini guilty as charged in the Second, Third and Fourth counts, to wit, Guilty of possession, sale and keeping for

sale of intoxicating liquors as charged.

A Motion in Arrest of Judgment and a Motion for a New Trial were duly made by defendants (Transcript of Record Pages 28-39) and both were thereupon overruled or denied by the Court. The Court then pronounced its Sentence and Judgment that each of the defendants, J. Pincolini and D. Pincolini (Plaintiffs in Error herein) be imprisoned in the County Jail of Washoe County, Nevada, for a period of five months and pay a fine of five hundred (\$500.00) dollars. (Transcript of Record, Pages 24-25 and Pages 39-41). Plaintiffs in Error herein J. Pincolini and D. Pincolini thereupon and thereafter duly filed their Assignment of Errors (Transcript of Record, Pages 41-52) and their Petition for a Writ of Error (Transcript of Record Pages 54-55) and the Court made and entered its Order allowing the Writ of Error (Transcript of Record, Pages 56-57) Bail and Cost Bond having been given and approved (Transcript of Record Pages 57-66) and Citation to Writ of Error was duly served (Transcript of Record Pages 68-70) The time of said Plaintiffs in Error for the filing and settlement of their Bill of Exception was extended from time to time by Stipulation and Order of Court until March 20, 1923, when it was settled and signed by the Court, and thereupon filed as such Bill of Exception.

## ARGUMENT

Without waiving any of the Errors assigned or any Assignment of Error set forth in the Assignment of Errors on file herein, we wish to call particular attention to the following:

### ASSIGNMENT NO. IX:

This refers to questions asked by the Assistant United States Attorney on cross examination of defendants' witness James Boyd which we believe belittles him in the eyes and opinion of the jury, without cause and was error prejudicial to the defendants. This witness had testified that he had rented room No. 16 in the Mizpah Hotel, a bedroom upstairs, and occupied it at the time of the raid by the prohibition agents. This was the room in which the officers testified they found liquor on the floor and a lot of broken bottles at the time of the raid. The witness Scott had testified that an acquaintance of his from Truckee, whom he had known and worked and slept with at Lake Tahoe, came to the Mizpah Hotel and complained to him of his inability to secure a room in Reno; that he told him that he (Scott) had a large double room and offered to share it with him, and his acquaintance accepted the offer. That he went down to get his baggage, and when he returned he had a grip and a sack with liquor in it; that, after some mild protest, Scott allowed the man to remain with him in the room something like two days and nights,



notwithstanding the liquor, and that he actually bought and drank some of it himself; that none of the Pincolinis knew anything about the liquor being there; and that when the raid was made, and he heard it in progress, the witness broke the containers of the liquor himself, allowing the liquor to escape on the floor, leaving the inference that that was the liquor found by the officers and a portion of the liquor introduced in evidence at the trial of the case. Then the following questions were asked by the Assistant United States Attorney with the following objection, ruling and exception, which questions and ruling we assigned as error:

“Q. I presume you broke these bottles that day because you realized you were breaking the law that you had intoxicating liquor in your possession?

A. I will tell you why I broke them; I broke them to protect the house as well as myself, for I had it there in the rooms; that is why I tried to destroy it.

Q. You realized somebody needed protection at that time did you?

A. Well, I realized I needed it, in a way, you understand.

Q. You realized you were breaking the law didn't you?

A. Not at that time I didn't know; I just didn't know only to destroy that stuff, that is all; that is all I thought about; not only to protect myself but to protect the house, because I had it there unbeknownst to them people.

Q. Did you think at that time you had a perfect right to have that kind of liquor in your possession?

A. I didn't think much about it.

Q. You never had heard of the prohibition law had you?

A. Yes, sir.

Q. Never had heard that the prohibition law prohibited your having moonshine whiskey in your possession?

A. Oh yes.

Q. You did know that your possession of that liquor was unlawful didn't you.

A. Well it must have been.

Q. And you know now when you are giving your testimony that you are making an admission that you yourself have broken the prohibition law, do you not?

A. I suppose I have.

Q. Do you realize right now that if we had the Marshal put you under arrest on the charge of having possessed liquor on that day, there would be nothing for you to do but enter a plea of guilty?

I am getting at his state of mind.

Mr. SALTER.—Objected to: he is not presumed to know the law in this case, or what would happen to him.

The COURT.—I will OVERRULE the objection.

MR. SALTER.— Exception.

The COURT.—Note the exception.

(By direction the reporter reads the question.)

The COURT.—Can you answer that question?"

(Transcript of Record Pages 77-78.)

We submit that the questions asked of this wit-

ness certainly unnecessarily belittled the witness in the eyes and opinion of the jury, and tended to bring the witness into disrepute with the jury and, therefore, improperly prejudiced the defendants and their interests.

## ASSIGNMENT NO. XII:

This refers to the action of the Assistant United States Attorney in asking, and the action of the Court in permitting him to ask of Plaintiff in Error J. Pincolini, a witness on behalf of defendants recalled for further cross examination the following question:

“Q. Now calling your attention to that particular day, whenever it was, that the officers were there and searched, do you recall having had a conversation with officers Brown and Nash that day there in the vicinity of the Mizpah Hotel, in which you said to them in substance at least, ‘Well, you didn’t find anything did you?’ to which Mr. Nash replied in substance, ‘No, but we found plenty of indications in the back room and cellars, I guess you will not deny that you had it there, you will surely get caught if you keep it up,’ and to which you replied, ‘Well, I don’t consider that it is committing a crime to sell liquors, and will keep on selling as long as I am out of jail,’ to which Mr. Nash replied to you, in effect, ‘All right, if that is the way you feel about it?’”

(Transcript of Record Pages 90-91.)

We submit that the objection made to this question (Transcript of Record Page 91) was well

taken and should have been sustained, and that said Plaintiffs in Error were prejudiced by the action of the Court in overruling it. It certainly could not have been either competent, relevant or material what the witness said to the officers at that time almost six months before the time when it is charged the offense was committed. The mere asking of defendant whether he did not say to the officers at that time that he would keep on selling liquor as long as he was out of jail must have prejudiced the jury, regardless of what his answer might have been. Then, too, he got before the jury the pretended statement of the officers that they found "plenty of indications" that defendants had had liquor there on the occasion of this former visit to their place, both of which matters were certainly inadmissible in evidence in this case.

### ASSIGNMENT NO. XIII:

This relates to the action of the Trial Court in denying the motion for a new trial on the grounds stated in the Motion. We shall deal particularly with subdivisions "(a)", "(c)", "(d)", "(e)" and "(f)" of the Tenth Ground stated in the Motion for a New Trial (Transcript of Record Pages 48-51) relating to what we believe to be improper instructions given to the jury or instructions improperly given to the jury by the Trial Court.

We concede that Federal Judges may comment upon the evidence. That is a right which they have exercised for many years at least. But still we maintain that it is the province of the jury to



determine the facts and the weight to be given the evidence; while it is the province of the Judge or Court to instruct as to the law. This is a province of the Judge and of the jury, respectively, even in the Federal Court. In the sequence of the procedure at the trial, the Government has the opportunity for both the first and also the last impression on the mind of the jury,—the accusation the opening statement, the first testimony, and then the closing or rebuttal testimony. Then in the sequence of the argument at the trial the Government again has the first and also the last impression on the mind of the jury the opening argument and also the closing argument, even without the comment of the Court on the evidence. The District Judge in this District is a splendid man and an able Judge and lawyer. Before he was elevated to the Bench, he was an advocate of great ability and practiced with marked success before the Courts of this and other states. His reputation for integrity as a man and citizen is as enviable and unimpeachable as is his reputation as a Judge, lawyer and advocate. His comment to the jury has great weight and influence, no matter whether it be an instruction as to the law or a mere comment or expression of his opinion as to a fact and the evidence sustaining it. When this comment takes the form of an expression of his opinion as to the weight to be given the evidence on a particular point or as to the result of evidence on that point, or as to what, in his opinion, the evidence establishes, it immediately assumes in the mind of the jury the form and proportions of an instruction

as to that fact, and a direction as to what verdict the jury should return, or at least a suggestion which the ordinary jury will be almost sure to follow. To the jury it is the application of the facts to the law by a trained mind, the trained mind of the man and lawyer in whom the jurors have the utmost confidence. To them it is the expression of such a man and mind, both as to the weight of the evidence and the result established by the evidence, and also as to the law. It does not make any difference how such a Judge and man hedges about his expression of opinion with "ifs" and conditions. Neither does it make any difference how often or how clearly the Court instructs the jury that it is to follow its own judgment as to the facts, "not the judgment of the Court or the judgment of counsel, or what counsel may have said or what the Court may have said" Neither does it make any difference how much emphasis the Court may place upon an instruction that the jury is the sole judge of the weight to be given the evidence, or that it alone is to determine what facts are established by the evidence. If such a Judge instructs the jury as to the fact, the jury immediately accepts the opinion of the Judge, for they have confidence in him both as a man and as a Judge. When he expresses an opinion as to what the evidence establishes, the jury immediately accepts it as the opinion of a mind trained in the law and experienced in determining matters of controversy, no matter how much the Court or Judge may hedge about his expression of opinion

by "ifs" or conditions.

It is especially dangerous for such a Judge to comment upon the evidence or to express his opinion as to what it establishes, when his instructions to the jury are given orally from the Bench. In such situations his comment and expressions of opinion as to the evidence and facts are so comingled with his instructions as to the law that it is impossible for the jury to segregate the one from the other. In other words, it is impossible for the jury to know what portion of the observations made by the Court from the Bench constitutes instructions as to the law, and what portion of these observations constitutes mere comment or the expression of opinion by the Court as to the facts and evidence and the weight to be given the facts. In such a situation, there is nothing to indicate to the jury what are instructions and what is mere comment, and such a comingling of instructions as to the law and mere comment or expressions of opinion as to the evidence and weight to be given it and as to the facts is particularly prejudicial when the observations of the Court are so general in their nature as they were in this particular case. As an example of this comingling of instructions and comment, we cite the following quotations: "There has been an abundance of evidence on the Third Count in the Indictment, of making sales;" and then almost immediately following and in the very next sentence the Court uses this language: "As you have been informed repeatedly it is your duty to accept the law as it is given

you by the Court; you cannot question the law as it is given to you; you must follow the instructions of the Court."

We call particular attention to the last clause in the last above quotation, to wit: "You must follow the instructions of the Court." It will be noted that the Court does not limit "the instructions of the Court" which the jury are told that they "must follow" to instructions as to the law. The jury is positively told that it "must follow the instructions of the Court." When the comment or expression of an opinion by the Court is so closely followed by such an instruction, we submit that it cannot be otherwise than prejudicial to the defendants. In other words, the Court tells the jury that there is sufficient evidence ("an abundance of evidence") to sustain the Third Count of the Indictment, the Count charging the defendants with the making of sales of intoxicating liquor, and then almost immediately tells the jury that it "must follow the instructions of the Court." Under such circumstances as these we submit that it was certainly error which was prejudicial to the defendants for the Court to so intermingle his expressions of opinion or comment on the evidence with his instructions as to the law.

With these observations in view we quote the instructions of the Court as follows:

"In determining whether there was a conspiracy you are to consider all the conduct of the parties; you will consider the locked door, if you think any of the doors were locked; you



will consider the conduct of Joe Pincolini with reference to this matter; you will consider the conduct of Dante and Adowaldo, and of the lady Mrs. Pincolini; and I think you would also consider the character of the establishment, the soft-drink place in front, the door and kitchen in the rear. That is a large room, the only furniture apparently being a sink, with a drain-board and running water, a cupboard and two shelves. You should also consider the bottles; the bottle that was found in the sink and the contents of that bottle. There is testimony that one of the milk bottles contained something smelling like alcohol. There were also a number of other bottles. One of the legs of the sink has been presented in evidence. I think it is something that should be considered by the jury in determining what the room was used for. You will notice neither end of the leg of the sink shows any nail marks; that leg has been there for a long time; it is hollow and can be taken out and put back again without destroying any nails, or any permanent fastening. The other leg is of the same character, and each leg is capable of being used to hide a bottle, perhaps several. You will also consider the sink and the running water, and the bottles there. Then I think it would be very proper for you to consider the testimony as to persons going from that back room to the door at the north, thence upstairs, if they went upstairs and coming back with the glasses, and with liquor if you believe that testimony.

There is no question about there being liquor in room 16. It is also a matter of significance that the liquor in that room was destroyed just at the time this raid was made, and that one of the defendants was there. If you consider the testimony of the witness Boyd, who

admitted that a friend of his had taken liquor up to room 16, isn't it rather a significant circumstance that this man only went up there on the 29th day of July, it was the first time that he had ever had that room, that he only stayed there until this raid was made, then disappears from the house, and is not there again as a tenant until this case comes on for trial; three days he has been there, and there is one day coming. These are all matters for you to consider in determining, not only whether there was a conspiracy on the part of these defendants; but also to determine whether that was a place kept for the purpose of selling intoxicating liquor. . . .

"Mr. Scott has testified as to two purchases made in April. Mr. Hogue has testified as to a sale that was made on the 2d day of August. If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on these dates. . . .

"There has ben an abundance of evidence on the third count in the indictment, of making sales; and there has been a denial of those sales. As you have been informed repeatedly it is your duty to accept the law as it is given you by the Court; you cannot question the law as it is given to you; you must follow the instructions of the Court. As to questions of fact, it is your duty to determine what the evidence proves, and you are to follow your own judgment, not the judgment of the Court, or the judgment of counsel, or what counsel may have said or what the Court may have said; you are bound to submit these matters of fact to your own conscience and to your own judgment, under the instructions, and a true verdict render";

(Transcript of Record, Pages 93-96.)

## Subdivision ("a"):

The error assigned in this subdivision has been discussed to a considerable extent in the general observations made under this Assignment No. XIII.

However, we wish to urge the injury and danger of this statement. Certainly, as to the Third Count of the Indictment, namely the selling of intoxicating liquor, this statement invades the province of the jury, and determines an essential fact which should be determined by the jury. In effect, it took away from the jury the right to determine whether the evidence did establish the fact that defendants sold liquor as charged, the right to determine whether the evidence was sufficient to establish that fact. Because of the splendid reputation of the Judge in this particular case, and the confidence reposed in him by the public generally, and, necessarily by the jury it also, in fact, determined that issue. The Court's language of which we complained in this particular is as follows:

"There has been an abundance of evidence on the Third Count in the Indictment, of making sales."

(Transcript of Record, Page 95.)

The Court could not have told the jury any plainer or in more complete terms that the evidence was sufficient to sustain the charge of selling intoxicating liquor.

That statement must have had its effect on the

jury in determining also the guilt or innocence of Plaintiffs in Error on the Second and Fourth Counts of the Indictment, namely, the charge of possession of intoxicating liquor and that of keeping intoxicating liquor for sale. Certainly, if they sold it they must have kept it for sale; and, certainly, if they sold it and kept it for sale, they must have had possession of it. This conclusion necessarily follows. This is certainly the fact when taken in connection with what the Court told the jury that the testimony of Scott and Hogue showed. Which is as follows:

“Mr. Scott has testified as to two purchases made in April. Mr. Hogue has testified to a sale that was made on the 2nd day of August. If their testimony is true, it shows that defendants were engaged in that place in selling liquor, at least on these dates.”

(Transcript of Record, Page 95.)

So, when the Court told the jury that there was sufficient evidence (“an abundance of evidence”) of the making of sales of intoxicating liquor by Plaintiffs in Error, it necessarily conveyed to the minds of the jury the idea that the statement also meant that there was sufficient evidence, in the opinion of the Court, to establish also the charges of the possession and of the keeping for sale of intoxicating liquor. Since the only three counts of the Indictment upon which Plaintiffs in Error were convicted were the sale, the possession, and the keeping for sale, of intoxicating liquor and since the jurors must have understood that the



above quoted statement of the Court applied to the possession and the keeping for sale, as well as to the sale of such liquor, the whole verdict must have been the result of this statement of the Court, or at least must have been influenced by it. For the foregoing reasons, we submit that the statement was error by which Plaintiffs in Error were prejudiced and injured.

The Federal Courts of this country and also the Supreme Court of the United States have spoken in no uncertain terms on the points involved in this Assignment of Errors as follows:

“But the cases agree that one qualification must always be borne in mind: All disputed facts must ultimately be submitted to the determination of the jury. If a dispute exists concerning a fact, the judge must leave the jury free. He may not himself decide the dispute or draw the inference. (Underscoring ours.) If he does, and if this action is prejudicial, he falls into such error as requires the judgment to be set aside. And this, we cannot avoid believing, is what happened in several particulars at the trial of this case.”

Fuller vs. N. Y. Life Ins. Co. 199 Fed,  
at Pages 900-901.

Starr vs. U. S. 153 U. S. 614; 38 L.  
Ed. at Page 845.

In stating that it is the duty of the judge to separate the law from the facts, and not comingle one with the other, Chief Justice Fuller, in the last above mentioned case, says:

“But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province.” (Citing *M’Lanahan vs. Universal Ins. Co.* 26 U. S. 1 Pet. 170, 182; 7 L. Ed. 98, 104). “As the jurors are the triers of facts, expressions of opinion by the Court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made to distinctly understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to.”

*Starr vs. U. S.*, 153 U. S. 614; 38 L. Ed. at page 845.

Subdivision (“c”):

This relates to the use of the following language by the Court:

“If each knew that the intoxicating liquor was there and it was kept there with his knowledge, and they were engaged in the business, the possession of one would be the possession of the other.”

(Transcript of Record, Page 49.)

This language was used in an instruction relating to the proof of possession of intoxicating liquor, and the necessity of proving actual possession and knowledge of possession by each of the defendants. The objectionable feature of this instruction is that it is not limited to a situation or condition where defendants have been proven to

have been engaged in the business together or jointly, and did not contain the element of joint business, or business in which the defendants concerned in the transaction were jointly engaged.

Subdivision ("d"):

In the Court's instruction to the jury, the following language was used:

"You are bound to submit these matters of fact to your own conscience and to your own judgment, under the instructions, and a true verdict render."

(Transcript of Record, Pages 95-96.)

Our objection to this instruction is that it does not contain the words "as to what the law is" or words of similar import after the word instructions, and especially we contend that this is necessary after the Court had told the jury that there was "an abundance of evidence on the Third Count in the Indictment, of making sales." Since the instructions as to the law were so comingled with the comment of the Court or the Court's expression of opinion with reference to the facts and the evidence, and as to what the evidence established, we submit that the Court erred to the prejudice of the defendants in giving this instruction without so limiting it. Especially is this true in view of the fact that the Court states what certain testimony showed.

## Subdivision (“e”):

In the case of *Starr vs. U. S.*, *supra*, Chief Justice Fuller points out the danger of the Court comingling with its instructions as to the law argumentative matter relating to and discussing the evidence. In the case at bar the Court used the following language:

“Isn’t it rather a significant circumstance that this man only went up there on the 29th day of July, it was the first time that he had ever had that room, that he only stayed there until this raid was made, then disappears from the house, and is not there again as a tenant until the case comes on for trial; three days he has been there, and there is one day coming.”

(Transcript of Record, Pages 94-95.)

We submit that this comment of the Court is entirely argumentative and certainly tends to prejudice Plaintiffs in Error.

## Subdivision (“f”):

In the Court’s instructions to the jury or its comment the following language was used in calling the attention of the jury to the interest of the defendants in the case, and in suggesting as an inducement for them to testify as they did in the case, an attempt on their part to shield from the consequences of a violation of the law, and any instruction given as to what elements they should



take into consideration in weighing the testimony in this case:

“Whether it is an attempt on his part to shield himself from the consequences of a violation of the law.”

(Transcript of Record, Page 51.)

Our contention is that it was error prejudicial to Plaintiffs in Error for the Court to call the attention of the jury to the interest that the defendants might have in this case, and to reasons which must have induced them to testify falsely, without, at the same time, calling the attention of the jury to the interest that the Prohibition Officers might have had in justifying their conduct in making the raid and to procure a conviction upon the Indictment which they had secured, and their anxiety in this regard.

Respectfully submitted,

McCARRAN & MASHBURN,  
Attorneys for Plaintiffs in Error.

No. 4000 5

In the United States  
Circuit Court of Appeals

For the Ninth Circuit

October Term, 1923

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D. PINCOLINI and J. PINCOLINI, Plaintiffs in Error,	}
—VS—	
THE UNITED STATES OF AMERICA, Defendant in Error.	

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Brief for Defendant in Error

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GEORGE SPRINGMEYER,  
United States Attorney.

CHAS. A. CANTWELL,  
Assistant United States Attorney  
Attorneys for Defendant in Error.



No. 4000

In the United States  
Circuit Court of Appeals

For the Ninth Circuit

October Term, 1923

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D. PINCOLINI and J. PINCOLINI, Plaintiffs in Error, — vs — THE UNITED STATES OF AMERICA, Defendant in Error.	}
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Brief for Defendant in Error

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**ARGUMENT**

The brief of plaintiffs in error is entirely devoid of citation of authorities. It is given up largely to statements of facts and evidence not appearing in the record, in an effort to supplement that record by matters not under the certificate of the trial judge. In this brief, we will endeavor to



refer definitely to the record in connection with the various assignments.

Furthermore, this brief will be confined to the assignments presented in the brief of plaintiffs in error, as under Rule 24 of this Court, the remaining assignments must be taken as waived by plaintiffs in error.

Assignment No. IX,

being alleged error in permitting counsel for the government to ask of defense witness Boyd, the question:

“Q. Do you realize right now that if we had the Marshal put you under arrest on the charge of having possessed liquor on that day, there would be nothing for you to do but enter a plea of guilty? I am getting at his state of mind.”

To which question the following objection was made, and by the Court overruled:

“Objected to: he is not presumed to know the law of this case, or what would happen to him.”

Plaintiffs in error do not argue that the objection, as stated, was not properly overruled by the trial court; in their brief, they now assume the objection to have been that the question tended to belittle and bring into disrepute their witness, and this operated to the prejudice of the plaintiffs in error.

The review in this court, however, is limited to the objection made in the trial court.

Bilboa vs. U. S. 287 Fed. 125.  
Robinson & Co. vs. Belt, 187 U. S. 41, 47,  
L. Ed. 65.

Assignment No. XII,

being alleged error in permitting counsel for the government to ask of plaintiff in error J. Pincolini, on cross-examination, as a basis for impeachment, the question appearing on page 90-91 of Transcript.

The record on this alleged error is found at pages 90 to 93 of the Transcript; from the record it appears:

1. That the question was asked to lay foundation for impeachment.
2. That the witness answered the question negatively.
3. That his answer was given before objection was made.
4. That the only objection made was in effect that it was not proper cross-examination.
5. That there was no motion to strike either question or answer.
6. That the court first ruled adversely to plaintiffs in error, but after referring to the record of preceeding testimony, reversed that ruling and debarred the government from offering impeaching testimony.

The objection came too late after answer given by the witness.

16 C. J. 874

The ruling being favorable to the defendant, it

presents no grounds for reversal.

As to the prejudicial misconduct of counsel in asking the question, argued by plaintiffs in error in their brief, there is no such assignment, and no such exception; hence that part of counsel's brief is not in point.

Assignment No. XIII,  
alleged error in denying motion for new trial.

The action of the trial court in denying a motion for a new trial is not reviewable.

Holder vs. U. S. 150 U. S. 92, 37 Law Ed. 1010.

It is true that this rule would seem to have this limitation, that if there is an abuse of discretion on the part of the trial court, his ruling on a motion for a new trial may be reviewed in the Federal Courts.

See Harley vs. U. S. 269 Fed. 384.

Here it is argued that there was such error in the court's instructions that a new trial should have been granted. The record discloses the following exception, and no other, taken to the court's instructions:

"If it please the Court, we except to the portion of the Court's charge wherein the Court summarizes and states the testimony, upon the ground that the same invades the province of the jury, and that the same is beyond the power of the Court in charging the jury as to mere matters of law." (Transcript p. 96).

Thereafter the Court further charged the jury as follows:

“I have discussed this testimony, because it is within the province of the Judge to do so if he believes it to be his duty. It may not be so in the State courts, but it is the province and right of a Federal Judge to discuss the testimony if he sees fit, and even to go so far as to give his opinion with reference to the case; provided he instructs the jury as I have done, that they must follow their own judgment, and that anything the Court says with reference to the facts and the evidence in the case, and the credibility of the witnesses, is a matter which can have no weight with them, except as it appeals to their judgment.”

Under the rules of this court, the exception was not legally taken, being general and not specific. To the trial court it came only as a general exception, questioning the right of the trial judge, in his instructions, to comment upon the testimony in any manner. What becomes of such an exception in the face of the admission made by plaintiffs in error in their brief filed herein? We quote from that brief: “We concede that Federal Judges may comment on the evidence”.

Had counsel, on the trial of this case, pointed out to the trial judge, by specific exception thereto, the particular parts of his instructions now commented upon by them, and had the trial court thereafter denied their motion for a new trial, they might now be in a position to raise the question as to whether in that ruling the trial court had been guilty of an abuse of discretion.

Finally, assuming that the question of the cor-



rectness of the instructions is properly here for review, an examination of the language used by the trial court will reveal that he repeatedly warned the jury against accepting what he might say about the evidence, except as it might appeal to their judgment. The Court has not at all invaded the province of the jury. The law in the Federal Court is too well settled to require citation of authority; it is merely a question of examining the instruction itself.

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For the reasons aforesaid, it is respectfully submitted the judgment should be affirmed.

Dated at Reno, Nevada, this 1st day of October, 1923.

Respectfully submitted,

GEORGE SPRINGMEYER,

United States Attorney.

CHAS. A. CANTWELL,

Assistant United States Attorney

Attorneys for Defendant in Error.

No. 4001

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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WILLIAM J. CAMPBELL and  
J. L. TOBIN,

Plaintiffs in Error

vs.

WILLIAM GRANT,

Defendant in Error.

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Transcript of Record

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In Error to the United States District Court  
For the Territory of Alaska  
Fourth Division.

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No. ....

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**United States  
Circuit Court of Appeals  
For the Ninth Circuit**

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**WILLIAM J. CAMPBELL and  
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**Plaintiffs in Error**

**vs.**

**WILLIAM GRANT,**

**Defendant in Error.**

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**Transcript of Record**

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**In Error to the United States District Court  
For the Territory of Alaska  
Fourth Division.**

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# INDEX

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	Page No.
Answer .....	6
Assignment of Errors .....	699
Attorneys of Record, Names and Addresses.....	1
Bill of Exceptions .....	10
Bond on Writ of Error .....	697
Complaint .....	3
Citation on Writ of Error .....	720
Certificate of Clerk to Transcript of Record .....	723
Defendants' Exceptions to Court's Instructions....	685
EXHIBITS:	
Plaintiff's	
"A" (Plat) .....	30
"B" (Location Notice) .....	77
"C" (Location Notice) .....	124
"D" (Certified Copy Location Notice)....	196
"E" (Certified Copy Location Notice)....	205
"F" (Certified Copy Location Notice)....	393
"G" (Agreement) .....	548
"H" (Registration Card) .....	645
"I" (Registration Card) .....	645
Defendants'	
"1" (Affidavit of Annual Labor) .....	142
"2" (Plat) .....	331
Finding as to Value .....	695
Instructions to the Jury .....	647
Judgment .....	692
Order Settling and Allowing Bill of Exceptions..	690
Order Fixing Supersedeas Bond .....	696
Order Approving and Finding as to Value .....	695

	Page No.
Order Allowing Writ of Error .....	719
Order Extending Return Day .....	721
Praecept for Transcript .....	2
Petition for Writ of Error .....	716
Reply .....	9
Stipulation Relative to Printing Record .....	1
Stipulation as to Value .....	695
TESTIMONY IN BEHALF OF PLAINTIFF:	
Busia, John .....	207
Rebuttal .....	628
Cross-rebuttal .....	630
Campbell, Wm. J. ....	202
Cross-examination .....	203
Friedrich, Alois .....	11-271
Cross-examination .....	31-274
Re-direct examination .....	45
Re-cross examination .....	222
Rebuttal .....	627
O. M. Grant .....	209-226
Cross-examination .....	235
Re-direct examination .....	249
Rebuttal .....	618
Cross-rebuttal .....	620
Grant, Wm. ....	51-313
Cross-examination .....	130-317
Re-direct examination .....	188-321
Re-cross examination .....	192-322
Rebuttal .....	618-631
Cross-rebuttal .....	620-638
Re-direct .....	644

Owen, Harry .....	288
Cross-examination .....	300
Re-direct examination .....	311
Re-cross examination .....	313
Parenteau, Roger .....	279
Cross-examination .....	286
Rebuttal .....	623
Cross-rebuttal .....	626
Quigley, J. B. ....	194
Cross-examination .....	201
Sutherland, Dan .....	251
Cross-examination .....	255
Re-direct examination .....	258
Ten Eyck, Wm. F. ....	258
Cross-examination .....	265
Re-direct examination .....	268
Re-cross examination .....	269
Further direct .....	270
Further cross .....	270
Rebuttal .....	615
Cross-rebuttal .....	617

#### TESTIMONY IN BEHALF OF DEFENDANTS:

Black, George .....	592
Busia, John .....	558
Cross-examination .....	562
Re-direct examination .....	564
Campbell, Wm. J. ....	324-331-472-613
Cross-examination .....	330-365-613
Re-direct examination .....	400
Re-cross examination .....	404
Sur-rebuttal .....	646



	Page No.
Dalton, Joseph .....	565
Cross-examination .....	574
Re-direct examination .....	589
Re-cross examination .....	590
Further direct .....	592
Further cross .....	592
Davis, John .....	473
Geoghegan, R. H. ....	595
Cross-examination .....	597
Moody, George .....	607
Cross-examination .....	609
Re-direct examination .....	612
Quigley, J. B. ....	478
Cross-examination .....	494
Re-direct examination .....	538
Re-cross examination .....	540
Further direct .....	541-550
Further cross .....	542-547-552
Roth, R. F. ....	601
Cross-examination .....	601
Tobin, J. L. ....	405-421-472
Cross-examination .....	434
Re-direct examination .....	465
Verdict .....	692
Writ of Error .....	717

**Names and Addresses of Attorneys of Record**

R. F. ROTH, Attorney for Defendants and Plaintiffs in Error, Fairbanks, Alaska.

MORTON E. STEVENS, Attorney for Plaintiff and Defendant in Error, Fairbanks, Alaska.

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In the District Court for the Territory of Alaska,  
Fourth Judicial Division  
No. 2528

WILLIAM GRANT, Plaintiff,

vs.

WILLIAM J. CAMPBELL and J. L. TOBIN,  
Defendants.

**Stipulation Relative to Printing of Record.**

IT IS HEREBY STIPULATED AND AGREED that in the printing of the record herein for the consideration of the court on appeal, that the title of the court and cause in full on all papers shall be omitted excepting the first page, and inserted in place and instead therein "Title of Court and Cause".

Done this 7th day of September, 1922.

MORTON E. STEVENS

Attorney for Plaintiff

R. F. ROTH

Attorney for Defendants.

Indorsed: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922. Robt. W. Taylor, Clerk by R. H. Geoghegan, Deputy.

(Title of Court and Cause)

### **Praeceptum for Transcript of Record**

To the Clerk of the above entitled Court:

You will please prepare the transcript of record in this case, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under a Writ of Error heretofore perfected to said court, and including in said transcript the papers hereafter set forth, to-wit:

1. Complaint
- 2 Answer
- 3 Reply
- 4 Verdict of the jury
- 5 Judgment
- 6 Bill of exceptions
- 7 Order Settling Bill of Exceptions
- 8 Assignment of Errors
- 9 Petition for writ of error
- 10 Writ of Error
- 11 Order allowing writ of error
- 12 Bond
- 13 Citation and admission of service thereon
- 14 Order of Supersedeas
- 15 Order extending return day
- 16 Stipulation for printing of the transcript
- 17 Praeceptum of transcript
- 18 Stipulation as to Value
- 19 Finding as to Value

Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth

Circuit, at San Francisco, California, before the 1st day of April, 1923.

R. F. ROTH

Attorney for Plaintiffs in error.

Indorsed: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922, Rob't. W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

(Title of Court and Cause)

### COMPLAINT

Plaintiff complains of defendants and alleges:

1.

That the defendants herein designated as John Dow and Richard Roe are so named for the reason that their true names are unknown to plaintiff. That plaintiff will ask to have the true names of such defendants entered in this action when such true names are hereafter disclosed to the Court.

11.

That plaintiff is now, and ever since the month of April 1920, has been the owner in fee, as against all persons, subject only to the paramount title of the United States in unpatented public domain, and ever since said date has been, and now is, entitled to the possession of that certain tract of placer mining ground known as Hill Bench Claim, containing Twenty (20) acres, more or less, being opposite to, adjoining and lying East of the Horse-shoe placer mining claim, on the right limit of Moose Creek, being Thirteen hundred and twenty feet (1320 ft) in length and six hundred and sixty (660) feet in width in the Kantishna Precinct, Alaska.



## 111.

That plaintiff is now, and ever since about the 25th day of July, 1921, has been the owner in fee as against all persons, subject only to the paramount title of the United States in unpatented public domain, and ever since said date has been, and now is, entitled to the possession of that certain tract of quartz mining ground known as Hill Side Lode Claim, the center upper end post of said claim being within the boundaries of the above described placer mining claim of plaintiff, and situate, about Eighty (80) feet down hill and in a Westerly direction from the mouth of what is known as the Quigley Tunnel, said post being the discovery post on which the notice of location of said claim is posted; thence running in a Westerly direction, and down-hill, along the vein, through said Hill Bench and Horse-shoe placer claims, a distance of Fifteen hundred (1500) feet to the center lower end line Post of said quartz claim. The side lines of said Hill Side Lode Claim run parallel to said lode, and Twenty five (25) feet on either side of the center of the vein, all in said Kantishna Precinct.

## IV.

That defendants are wrongfully in possession of the above described placer and lode claims of plaintiff, and have wrongfully excluded plaintiff from the possession thereof, and continue to wrongfully withhold the same, to the damage of plaintiff in the sum of Five Hundred (\$500.) Dollars.

WHEREFORE plaintiff demands judgment

against defendants, and each of them:

1st. For the possession of the property herein described, and the whole thereof, and that plaintiff be adjudged to be entitled to the possession, and the whole thereof.

2nd. For damages for the wrongful withholding of said premises in the sum of Five hundred (\$500.) Dollars.

3rd. That defendants, and each of them, and all persons acting through them, or upon their behalf, be enjoined, pending the determination of this suit, and for all time thereafter, from in any manner whatsoever interfering with the plaintiff's right of possession of the property in this complaint described.

4th. For costs and disbursements herein expended.

MORTON E. STEVENS

Attorney for Plaintiff.

United States            {  
Territory of Alaska    { ss.

William Grant, being first duly sworn, upon his oath deposes and says: That he is the plaintiff above named, that he has read the foregoing complaint, knows the contents thereof, and that the same is true, as he verily believes.

WM. GRANT.

Subscribed and sworn to before me this 9th day of August, 1921.

(Seal)

MORTON E. STEVENS.

Notary Public for Alaska. My commission expires July 15, 1922.

Indorsed: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 9, 1921, H. Claude Kelly, Clerk, by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

**ANSWER.**

Comes now the defendants William J. Campbell and J. L. Tobin, and answering plaintiff's complaint on file herein, allege and deny as follows:

1.

Answering Paragraph 2 of said complaint, defendants deny each and every allegation contained in said paragraph.

11.

Answering Paragraph 3 of said complaint, defendants deny each and every allegation contained in said paragraph.

111.

Answering Paragraph 4 of said complaint, defendants deny each and every allegation contained therein,

For a further separate and affirmative defense, these defendants allege as follows:

1.

That on the first day of June, 1921, these defendants discovered a vein or lode of quartz in place bearing gold, silver and other valuable minerals on unappropriated public domain of the United States, on the left limit of Friday Creek and on the right limit of Moose Creek and at the confluence of said two creeks in the Kantishna Mining and Recording Precinct, Territory of Alaska, and that on the sixth

day of June, 1921, these defendants located and marked the boundaries on the ground so that the same could be readily traced and located the same as a lode claim and called it the Silver King Lode Mining Claim; that they posted a notice of location of said Silver King Lode Mining Claim at the place of discovery which was a shaft sunk by them to a depth of about forty feet or more, and thereafter, to wit on the seventh day of July, 1921, recorded the notice of location so posted at the discovery shaft, as in this paragraph stated,, in the office of the Recorder of the Kantishna Recording Precinct, Fourth Judicial Division, Territory of Alaska, and that the same was recorded in Volume One of "General" at Page 207 and was numbered by the Recorder of said Precinct as No. 3147.

## 11.

That said discovery of rock in place, bearing gold, silver and other valuable minerals as herein before described, was upon a vein or lode which was well known to exist long prior to the first day of June, 1921.

## 111.

That ever since the sixth day of June, 1921, these defendants were the owners of and are now the owners of said Silver King Lode Mining Claim and have the title in fee thereto, as against the whole world except the paramount title of the United States.

## IV.

That these defendants were in possession of said Silver King Lode Mining Claim at the time of the



commencement of this action and at said time were carrying on the work of developing the lode upon said claim.

# V.

That the lode claim of these defendants above described and now in possession of these defendants is the only ground in the possession of these defendants and claimed by them which is referred to in Paragraph 4 of plaintiff's complaint and these defendants allege that plaintiff has no right, title or interest in or to said Silver King Lode Mining Claim as against these defendants.

WHEREFORE Defendants William J. Campbell and J. L. Tobin pray judgment against plaintiff;

1st. That plaintiff take nothing herein.

2nd. That said defendants William J. Campbell and J. L. Tobin be adjudged to be the owners of said Silver King Lode Mining Claim as against all the world and especially plaintiff herein, except as against the paramount title of the United States.

3rd. That these defendants William J. Campbell and J. L. Tobin have and recover of and from plaintiff their costs and disbursements herein expended.

R. F. ROTH

Attorney for defendants William J.  
Campbell and J. L. Tobin.

United States of America.	{	ss.
Territory of Alaska		

William J. Campbell, being first duly sworn, upon oath deposes and says: That he is one of the defendants named in the foregoing answer, that he has read

the same, knows the contents thereof, and that the same is true of his own knowledge as he verily believes.

**WILLIAM J. CAMPBELL**

Subscribed and sworn to before me this 12th day of October, 1921.

(Seal)

**HOWARD J. ATWELL**

Notary Public in and for the  
Territory of Alaska. My commission  
expires Nov. 15, 1923.

Due service of a copy of the foregoing Answer admitted this 12th day of October, 1921. Morton E. Stevens, Attorney for Plaintiff.

Indorsed: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 12, 1921, H. Claude Kelly, by Clerk, by R. H. Geoghegan, Deputy.

(Title of Court and Cause)

**Reply**

Comes now the plaintiff and for reply to the answer of the defendants, herein, William J. Campbell and J. L. Tobin, says:

1.

That plaintiff denies each and every allegation contained in defendants so called further, separate and affirmative defense, as contained in paragraphs 1, 2, 3, 4, and 5 thereof, saving and excepting that plaintiff admits that said defendants were in possession of a portion of the mining property described in plaintiff's complaint, at the time of the commencement of this action, and claimed by plaintiff.

**MORTON E. STEVENS**

Attorney for Plaintiff

United States                    }  
Territory of Alaska        } ss.

William Grant, being duly sworn, upon his oath deposes and says: that he is the plaintiff above named, that he has read the foregoing reply, knows the contents thereof, and that the same is true as he verily believes.

WM. GRANT

Subscribed and sworn to before me this 28th day of November, 1921.

(Seal)

MORTON E. STEVENS

Notary Public for Alaska.

My commission expires July  
15th, 1922.

Service of the foregoing Reply and the receipt of a copy thereof is hereby admitted this 29 day of November, 1921. R. F. Roth, Attorney for answering defendants.

Indorsed: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 29, 1921, H. Claude Kelly, Clerk by R. H. Geoghegan, Deputy.

(Title of Court and Cause)

This case came on regularly for trial at Fairbanks, Fourth Judicial Division, Territory of Alaska, at 10.00 A. M., February 1, 1922, Honorable Cecil H. Clegg, Judge, presiding.

Mr. M. E. Stevens appeared as attorney on behalf of the Plaintiff, and the Defendants and their attorney Mr. R. F. Roth, were present in Court. Proceedings were regularly taken to impanel a jury, after which an opening statement was made on each side,

whereupon at the request of the attorney for the plaintiff, the witnesses were excluded from the court room, save the witness under examination, and the following proceedings were had and testimony was taken:

Alois Friedrich called as a witness for the Plaintiff, after being duly sworn, testified:

**Direct Examination**

By Mr. Stevens:

Q Please state your name.

A Alois Friedrich.

Q How long have you lived in Alaska?

A Pretty close to twenty five years.

Q Have you lived in the vicinity of Fairbanks for a number of years?

A Yes, since 1904.

Q State whether or not you have been engaged in mining.

A I have, around Fairbanks considerably.

Q In Alaska?

A In Alaska.

Q Ever since you have been here?

A Most of the time.

Q Have you had experience in placer mining?

A Very little.

Q Have you had experience in quartz mining?

A Considerable of it.

Q Since you have been in Alaska?

A Since I have been in Alaska.

Q Have you had any mining experience prior to your coming to Alaska?



A Some.

Q Where?

A In northern Wisconsin.

Q Have you been in the Kantishna Precinct or mining district?

A I have.

Q How long have you been up in that country?

A I was up there in 1905 and 1906 approximately eighteen months.

Q Have you some interests over there as a miner?

A I have, yes sir.

Q What profession, if any, do you follow?

A At present I am following surveying.

Q And civil engineering?

A Yes sir.

Q Have you had experience as a surveyor?

A I had considerable experience on the outside as a boy, running with county survey parties, etc. between the age of eighteen and twenty-two.

Q You assisted in surveys?

A As chainman and rodman.

Q Have you had any training in mathematics and surveying?

A I have.

Q What is the extent of your education in that line?

A I have taken a complete course in recent years with the International Correspondence School.

Q You completed that course, did you?

A Yes sir, the surveying course is completed.

Q You obtained your degree to that effect?

A I haven't got papers yet as I wish to go on with engineering and it will probably take another six months to get a diploma.

Q State whether or not you have obtained an education in mathematics.

A I have taken the complete course in mathematics.

Q Are you acquainted with the ground in controversy in this case?

A I am acquainted with it.

Q Have you recently made any surveys in regard to the ground in dispute in this case?

A I have.

Q Did you make a survey of what Mr. Grant, the plaintiff in this case, has designated as the Hill-side Bench Claim on the right limit of Moose Creek adjoining north of the placer claim known as the Horse Shoe Claim.

A I made a complete survey of the tract.

Q Did you make measurements and calculations of distances, etc. —

A Yes sir.

Q ---in regard to the quartz location of Mr. Quigley, known as the Red Top Lode Claim?

A I have located two of Mr. Quigley's posts, one is his north west corner, and also his center stake.

Q You took field notes of your observations in the vicinity of those claims?

A Yes sir.

Q And did you draw a map or plat from those field notes?

A I did.

Q I call your attention to a plat or map on the blackboard here and ask you to examine the same and state whether or not this is the same plat you made from your field notes as a result of your survey and measurements.

A This is the exact plat made from the result of field notes and survey.

Q And you made that at the request of the plaintiff?

A Made it at the request of plaintiff's counsel.

Q And it was made within the last few days?

A Between the 12th and 14th of January.

Q It is identified by your signature?

A By my signature.

Q Printed signature?

A Yes.

Q Down near the lower left hand corner you have indicated apparently the direction of the magnetic north.

A Correct.

Q Is that the true course as indicated on there?

A No, that is magnetically correct.

Q Is that the true indication of the magnetic course?

A Correct.

Q Now the true north would be farther towards the left of the map, would it not?

A To the west approximately twenty-nine degrees.

Q Farther to the west than is indicated by the magnetic north?

A Twenty-nine degrees being the variation of the magnetic needle.

Q In the lower left hand corner of the map is a point indicated as corner No. 1 post.

A Correct.

Q Did you see that post?

A I did.

Q Do you know whether or not there is any writing upon it?

A There is not anything legible. The post is so old and the writing is indistinct.

Q How high is the post above the ground?

A Approximately four feet above ground.

Q How large is it in diameter?

A Square four inches-cottonwood.

Q Do you know whether or not it contains a number?

A It contains No. 1 initial post.

Q Can you state whether anything else is written on the post inside towards the placer claim?

A I could distinguish "19--" but could not complete the rest. Also distinguished Mr. Grant's name.

Q William Grant?

A Yes. And distinguished claiming 660 ft. in a northerly direction-northeasterly direction.

Q Anything else on the post?

A Not that I remember.

Q Passing on to the lower right hand portion of this map, there is a point designated as corner No. 2 post. Were you there?



A Yes sir.

Q What kind of a post is that?

A It is four inches square. It is leaning- doesn't stand upright. If it was upright, it would be approximately four feet above the ground. Cottonwood also.

Q How thick?

A Square four inches.

Q Did you see any writing?

A Yes sir, you can see "Post No. 2" and William Grant's name.

Q Can you distinguish the name of the claim on that post No. 1?

A Not on that one.

Q What is the appearance of post No. 2 relative to age?

A It must be five or six years old, if not older. Indications are that it has been there a long time- leaning over from age.

Q Then in a northerly direction, generally speaking, to corner No. 3 post. Were you there?

A I was there.

Q And what did you observe relative to that post?

A I found on No. 3 post, don't remember distinctly whether it was April 16th or 19th- couldn't say positively- 1920, April 16th or 19th, 1920.

Q Did you say or not, that it was No. 1?

A Post No. 3.

Q Could you see the name of any claim?

A Not that I remember.

Q Or the name of the locator?

A No.

Q How high above the ground was it?

A Approximately three feet above the ground.

Q Was it as much as three feet?

A Pretty close-I didn't measure.

Q About how thick was it?

A Between two and one-half and three inches.

Q Was there snow on the ground?

A Considerable.

Q About how deep?

A Eighteen inches probably.

Q Passing over to the upper left hand corner, near there is corner No. 4 post designated. Were you there?

A I was.

Q Did you see that post?

A I did.

Q Describe it.

A That post was approximately three feet above ground, two and one-half or three inches square, and claiming 660 ft. down hill, post No. 4. No writing.

Q Did you see the name of the claim or locator?

A No.

Q Did you see any arrows on that post pointing down hill?

A Yes.

Q One arrow pointed down hill towards No. 1?

A Yes sir, correct.

Q Did you see any arrows pointing towards post No. 3?

A No.

Q Going back the way we came to post No. 3. Were there any arrows there?

A Not that I can remember.

Q Did you see any arrows on post No. 2?

A Couldn't possibly be-too old.

Q Any arrows on post No. 1?

A No, too old, couldn't distinguish it.

Q Did all four posts indicate considerable age?

A The lower two did, and the other two a year or eighteen months approximately, as near as can be judged from the color of the posts.

Q Posts No. 1 and No. 2-did you examine the other side opposite Grant's placer claim?

A I did.

Q Did you see any names?

A Positively nothing.

MR. ROTH: Which stake?

MR. STEVENS: Other side of No. 1 and No. 2.

Q What claim is adjoining?

A I don't know-understand Mr. Hamilton—

Q Well, is Mr. Hamilton's claim known as the Horse Shoe Claim?

A I don't know.

Q What are Mr. Hamilton's initials?

A John Hamilton.

Q On the line between corner post No. 1 and corner post No. 4 you have indicated corner No. 5, being 660 ft., according to the map, between initial stake and No. 5. Is that the result of your measurements?

A Chaining, yes.

Q You chained up the distance from initial post along the end line 660 ft?

A Correct.

Q Then from what you have there corner No. 5 up to corner No. 4 indicates a distance of 136 ft. between those two?

A Correct.

Q Is that the result of accurate measurements?

A That is the result of accurate chaining.

Q How about the other line, the southerly side line, between post No. 1 and post No. 2 which you have marked 1400 ft. 8 in. Is that correct?

A As near as can be chained.

Q You chained to find out?

A I had two chainmen chaining it.

Q You were there setting each point with the instrument?

A Yes sir.

Q The distance between post No. 2 and No. 3 as indicated on this map is 616 ft. 8 in. Is that correct?

A Same kind of chaining.

MR. ROTH: What is measurement?

MR. STEVENS: 616ft. and 8 in.

Q From corner No. 3 to corner No. 4 you have indicated on the map as being 1300 ft.

A A correct.

Q Is that the result of measurement?

A Result of measurement.

Q Then the line from corner No. 3 to corner



No. 5 is indicated on here as 1290.4 ft. Is that correct?

A Correct. That is calculation from the triangle.

Q You calculated the distance instead of measuring?

A Instead of measuring.

Q The accuracy is just as good as if measured?

A Should be better.

Q Entirely outside of the boundaries of this placer claim, or any of the boundaries, and near the top of this map, there is a small square and that is indicated as "Quigley's Discovery." Were you up there?

A Yes sir.

Q What is that discovery?

A A shaft sunk to considerable depth, showing the lode.

Q It is recognized and known as Quigley's discovery on a lode or vein?

A Yes, the Red Top Lode.

Q Were you in the country when Mr. Quigley started that?

A I was in the country, yes.

Q How long ago was it when you first saw the Quigley discovery?

A Some time during the early fall of 1920. Mr. Quigley had made his discovery a little earlier than mine-mine was in August-his in July.

Q It was 1920?

A Somewhere along there.

Q Coming along down south-southwesterly from

that discovery of Quigley's, according to this plat, you have marked 170 ft. and 4 in. from the discovery of Quigley's down to the intersection of the line between corner post No. 3 and corner post No. 4 of the placer location. Is that correct?

A Correct, by measurement again.

Q And from that intersection of that line that point you have marked 96 ft. and 10 in.---

A Correct.

Q---down to what is the mouth of Quigley's tunnel---

A Yes sir.

Q Is that correct?

A Yes sir, correct according to measurement.

Q Coming on down along supposedly that bench you have 173 ft. indicated as the distance between the mouth of Quigley's tunnel and Quigley's end stake which is on the line indicated on the map as between the southwest corner of the Red Top Lode and the southeast corner of the Red Top Lode. Is that distance of 173 ft. correct?

A It was measured, but over very rough ground and there might be a variation of one foot, but it is substantially correct.

Q You also have a distance indicated of 160 ft. between the extension of the lower end line of Quigley's claim and the extension of corner No. 5. Is that the correct distance?

A That is the correct distance.

Q Mr. Friedrich, you have indicated in orange color, or red---

A Orange.

Q —the southerly end line of Quigley's location, and from Quigley's southwest corner of the Red Top Lode to the center post of the Red Top Lode is 320 ft. —

A 320 ft. is correct as near as you can make it.

Q Was it measured by you?

A Yes sir.

Q That is one side of what is supposed to be the center of the vein?

A The northwest side.

Q And the other side was put on approximately?

A Approximately 300 ft.

Q You scaled and put it on the map?

A Did not measure that distance.

Q Now you have indicated by a dotted red line between A and B, and between C and D on either side of what might be the vein of the Red Top. What do those lines indicate?

A They indicate 25 ft. distance on each side of the center of the lode.

Q Those are imaginary lines, are they not?

A Yes, imaginary.

Q They were put there to indicate where the Red Top location side lines would be if Quigley had confined himself to 25 ft. on either side of the center of the vein within the boundaries of the placer claim?

A That is the idea.

Q But those lines do not exist?

A No, they do not exist.

Q Those lines were put on at my request to indicate the situation?

A That is it.

Q As I understand, the distance as indicated there, 173 ft., is correct?

A Oh, that is as nearly correct as you can make it.

Q There are dotted lines from near the point "A" running down hill westerly, or southwesterly, and another line from "D" or near "D". running down hill parallel thereto, inside of which two lines you have the Hillside Lode Claim. Did you put those on there?

A I did put those lines on, yes sir.

Q Those were put on there to indicate the quartz location made by the plaintiff in this case?

A They were put there and are approximate.

Q Being 25 ft. on either side of the center of where the lode is supposed to run?

A Should be.

Q Will you state to the jury what scale this map is?

A The scale is one inch equals 100 ft.

Q 1 inch to 100 ft.?

A Correct.

Q That is indicated on here?

A Yes sir.

Q Probably 50 ft. or more below, or in a southwesterly direction from the center post of the Red Top, there is a little square there and it is indicated as the Campbell and Tobin shaft. What is that?



A All I can see is a hole with a windlass set over it, was never down in it.

Q Was there any dump?

A Oh, yes.

Q Was any one with you when you looked at it?

A Yes.

Q Who was there?

A Mr. Grant and O. M. Grant.

Q Did either one of those gentlemen identify and ask you to measure from that?

A They did, in fact, I located all holes from that line.

Q Now looking at the map, to the right is indicated just a hole. Is the location of that hole correct?

A It is approximately correct.

Q And the other hole we have been talking about, is that approximately correct?

A They are located from the supposed strike of the vein.

Q Running straight in line with Quigley's discovery?

A Correct. The line runs north 41 east magnetic.

Q I believe you have indicated here ten holes altogether on that map.

A Correct.

Q Are the locations of those ten holes approximately correct?

A They are approximately correct.

Q You have indicated the depth of the holes.

A They were all given to me by Mr. Grant.

Q You didn't measure them?

A I did not.

Q Could you see to the bottom?

A I had them all shoveled out, but they are all full of water and ice.

Q Were you able to look down in those holes and see something approximately like the distance?

A Yes, within two or three feet anyway.

Q Down in the vicinity of these holes and within the boundaries of the placer claim as indicated, there is a dark square there indicated as a "cabin". Is that approximately correct?

A Yes, approximately correct.

Q In 1921, along in June or July, was that cabin there?

A Not to my knowledge.

Q Was there a tent?

A Not to my knowledge-I didn't know anything about it.

Q Were you there along in July?

A Yes, along some time in July-there is a natural crossing there and---

Q The house indicated as Quigley residence, the block indicated as the cache, the bunkhouse and blacksmith shop-state whether or not those four buildings are by common repute the buildings of Mr. Quigley.

A Yes, they are Mr. Quigley's buildings.

Q Are they indicated approximately correct on the map?

A They are approximate-the house is absolutely correct, but the cache, bunkhouse and (the black-

smith shop is absolutely) -others approximately. The cache and bunkhouse are approximate.

Q Of course, those holes and houses are really too big to be drawn--are indicated too large according to the scale of the map?

A They would have to be exaggerated to see them at all.

Q Now Mr. Friedrich, I see here in a very good character of printing, near the top of the map, a statement as follows: "The area between the boundaries of Post No. 1, Post No. 2, Post No. 3, Post No. 4, corner No. 5, and Post No. 1, or place of beginning, is equal to 23.66641 acres." Is that the correct area as indicated between those various posts?

A It is.

Q And that relates to the area of the Hillside Placer Claim, according to the original stakes?

A According to stakes Nos. 1, 2, 3 and 4 as I found them, yes sir.

Q The excess over twenty acres would be a little over 3.6 acres?

A Yes sir.

Q There is another statement on here as follows: "The area within the boundaries of Post No. 1, Post No. 2, Post No. 3 and corner No. 5, and Post No. 1, or place of beginning, is equal to 21.65278 acres in area."

A Yes sir.

Q That relates to the area of the placer claim between the initial post, post No. 2, post No. 3, and corner No. 5?

A Yes sir.

Q And that area is a little over 1.6 acres in excess of 20 acres?

A Correct.

Q State whether or not you have calculated the area between A. B. C. and D, as indicated here by your imaginary lines, 25 ft. either side of the vein of the Red Top Claim.

A I have. It is approximately 6650 square feet—43560 ft. being a square acre.

Q Approximately what portion of an acre is it?

A Approximately one-sixth or one-seventh of an acre—less than one-half—there are 43000 ft. and over in an acre, and that contains 6650.

Q You have indicated that the survey was commenced January 12th, 1922 and finished January 14th, 1922. Signed by yourself, Alois Friedrich. William F. TenEych, head chainman. Did Mr. TenEych assist you in that measuring?

A Yes.

Q As head chainman?

A Yes sir.

Q And John Hamilton, rear chainman?

A Yes.

Q Is that the same John Hamilton you spoke of as owning the claim adjoining?

A Yes sir.

Q Towards the left part of this map there is a corner indicated as the northwest corner of Campbell and Tobin location which seems to be the same point as is indicated above as the southwest corner of the Red Top Claim.



A They have tied directly on to Mr. Quigley's corner post. One point serves for both as I couldn't indicate it very well otherwise.

Q The two posts are tied together?

A Yes sir.

Q One is Quigley's Red Top Lode and the other Campbell and Tobin?

A Yes.

Q Now, going over to the southeast corner of the Red Top Claim, you have indicated the same corner as the northeast corner of Campbell and Tobin.

A The same condition exists.

Q Now, as I understand it, that line between those two corners indicates the southerly end line of the Quigley Red Top Claim?

A Correct.

Q Or the lower end line?

A The lower end line.

Q The same line indicates the upper end line of the Campbell and Tobin location.

A Correct.

Q And, according to measurement on one side and your estimate of 300 ft. on the other side, the claim would be approximately—each of those locations would be 620 ft. wide?

A Very close.

Q Did you see the point of discovery and location notice of the plaintiff, William Grant for the Hillside Lode Claim on the ground?

A I saw his three stakes and the center stake.

Q Do you know what the center stake represented?

A I never went near to examine them close, but he called my strict attention to his name and location, Hillside Lode Claim.

Q Was there a stake on either side of that discovery post?

A There was one approximately 25 ft. on each side of the lode.

Q You saw three posts and you say the distance between the two extremes was approximately 50 ft.—50ft. between the two extremes and approximately 25 ft. from the center?

A Yes.

Q Using those posts as the distances that you have indicated did you draw the approximate side lines of the Hillside Lode Claim upon this map?

A I did.

Q And did you draw it as the approximate side lines of the plaintiff's quartz location, known as the Hillside Lode Claim?

A The Hillside Lode Claim, yes.

Q But they are not the result of absolute measurement?

A No, those lines are imaginary, merely a continuation of the Quigley lode.

Q They were put there on my request and are not based on measurements?

A They are very nearly correct.

Q Were you down below here to the end stakes of Grant's quartz location?

A No sir.

Q Were you down to the end lines of the Campbell and Tobin quartz location?

A No sir.

Q You didn't make any professional observations or measurements below the lower side line of the placer claim?

A No sir.

Q You have drawn here two lines which would be extensions of the side lines of the Quigley location, and one side you have indicated as the side line of the Campbell and Tobin location. Is that approximately correct?

A It is approximately correct because I have not gone to either end post and merely squared out from the end lines of Quigley's location.

Q The upper end line of the Campbell and Tobin claim as indicated is correct?

A That is correct.

Q And at that point at least Campbell and Tobin's quartz claim is of the same width as the lower end line of Quigley.

A Exactly.

MR. STEVENS: We introduce this plat in evidence.

(No objection made and plat is admitted and marked Plaintiff's Exhibit A)

MR. STEVENS: This is all that I want to ask this witness at this time—just to introduce the plat and his survey—but I would like to recall him later, if there is no objection, on some other matters.

COURT: I presume there is no objection.

**Cross Examination**

BY MR. ROTH:

Q You state that you (outside of this survey that you made of the so-called Hillside Bench Claim) had been acquainted with that ground for some time?

A I did.

Q How long?

A The lay of the ground I have known for two years anyway. I am not speaking of the claim itself.

Q I am speaking of the claim itself—the placer claim.

A I do not know of the placer claim not for over twelve months.

Q You have known it twelve months?

A I have known it that length of time.

Q Did you see any of the stakes as long ago as twelve months?

A The lower two I have.

Q When you speak of the lower two what do you mean?

A Nos. 1 and 2.

Q Did you go to those stakes twelve months ago?

A Not deliberately—I run across stake No. 1.

Q When was it, the first time?

A I couldn't repeat the date—it was a case of going fishing down the river.

Q What was the first date, approximately?

A Almost impossible for me to say—it was last



summer some time—couldn't say exactly—some where in July.

Q July 1921?

A No, it was 1920. I came out in July 1921—it was somewhere in July or August 1920.

Q Of 1920?

A 1920.

Q You run across stake No. 1?

A No. 1.

Q What was on the stake at that time?

A I don't think I stopped to read it.

Q Did you try to read it?

A Don't think I did at that time.

Q Do you recollect seeing anything on it?

A No, do not recollect seeing anything.

Q When was the first time you saw stake No. 2?

A Somewhere near that time—was coming across from Mr. Haney's to Mr. Quigley's.

Q Did you examine it?

A I did not.

Q Did you see any name on it?

A No sir.

Q When did you first see stake you have marked corner No. 3?

A That was January 12th of this year.

Q That was the first time?

A That upper stake, yes.

Q Just exactly what was written on that, from your field notes?

A I did not take field notes of the writing on

that stake because it is indistinct. As I said in my former statement, you can merely read on there "April 16" or "19" (couldn't say positively) "1920. Stake No. 3". That is all I could read.

Q "Stake No. 3". That is written?

A That is written on there.

Q How does it come you did not make a memorandum in your field notes?

A There were two other witnesses when we read it.

Q And as an engineer, don't you think it is proper to put it down in your field notes?

A I probably should have taken it down in field notes.

Q How old did that stake seem to be?

A Well, it seemed to be considerable over a year old from the color—that is all you can judge from—it was considerably weathered.

Q What kind of wood is it?

A Spruce.

Q Driven in the ground?

A On some rocks.

Q What size is it?

A From two and one-half to three inches.

Q Did you make any field notes of the size of the stake? Did you measure it?

A No, I did not.

Q Why didn't you measure it?

A I did not consider the size of the stake of sufficient necessity to measure. Am usually very good at getting measurements of that kind.

Q You as an engineer don't take exact measurements?

A Oh, of other things-but the size of a stake-

Q How high was it?

A Approximately three feet.

Q Only approximately? You did not measure?

A No sir, I did not.

Q Was it hewed on four sides?

A Yes sir.

Q Blazed on four sides?

A Yes sir.

Q That stake should have everything written on it within the last two years.

A Yes, it should have.

Q You think everything on there is legible that was put on there?

A It should be as legible as it ever was.

Q All you saw was corner No. 3, and what else?

A "April" either "16" or "19", I couldn't tell which, "1920".

Q Nothing else?

A No.

Q Going up to stake you have marked No. 4. What was written on that stake? Have you field notes?

A No, I have no field notes-merely took initial stake. It reads 660 ft. with an arrow pointing down hill. Stake No. 4. That is all.

Q Nothing else on the stake?

A No.

Q Are you sure there is nothing else?

A Almost sure.

Q Isn't it written there, "1550 ft. straight up, and "1550 ft. straight down?"

A No sir, I haven't seen it.

Q You saw everything on there?

A I might have over-looked something. Yes, that is all I can testify to, or would testify to.

Q You wouldn't testify that it wasn't on that stake?

A I wouldn't swear to it, no.

Q You have something here marked corner No. 5. What is there?

A It is an instrument point.

Q There isn't any stake there?

A No sir.

Q There wasn't any stake there, and that point is one you put there, and there is absolutely nothing there?

A No sir.

MR. STEVENS: Didn't you put something on the ground?

MR. ROTH: Didn't you put an instrument point there that is there now?

A An instrument stake, yes sir.

Q Where is this stake or this post you have marked corner No. 3 with reference to the road that runs around there from Haney's claim?

A Just a little above the road.

Q About how far?

A I wouldn't attempt to say.

Q You are pretty good at estimating, give us an estimate on that.

A It should be between thirty and forty feet.



Q You went by there on that Haney road a year ago?

A Not on that hillside road.

Q When is the last time you went over that road that I am referring to now and we are talking about before you surveyed the ground here in January?

A I don't remember when I went by that stake—not for some time because Mr. Haney went out—and I visited with him—I don't remember since then when I went down that particular road.

Q When did you visit Mr. Haney?

A I went up there a year ago in the fall of the year.

Q At that time you went over this road?

A Yes.

Q Did you see this stake?

A I don't remember. I wasn't looking for it.

Q You didn't see it?

A No.

Q When did you first go to the Quigley tunnel?

A Have been through there so often I don't remember the first time.

Q With reference to the time he started the tunnel?

A He must have started somewhere along in February a year ago. He was then in approximately twenty or thirty feet. I was in Fairbanks when Quigley started.

Q He was in approximately thirty feet when you got there?

A Yes, somewhere near that.

Q What did you see in the tunnel when you saw it the first time?

A I saw his lode exposed, of course.

Q Right at the mouth of the tunnel?

A At a considerable depth, in twenty or thirty feet.

Q Did he have some timber in?

A Yes.

Q Did the timbers shut off the view of the lode?

A They do.

Q So you don't know really from your own knowledge how close to the mouth of the tunnel that lode extends?

A No sir.

Q In other words, you don't know how far he drove the tunnel before he hit the lode.

A No sir.

Q At that time—prior to that time, have you ever seen that stake you have marked on there as corner No. 4 post?

A I don't think I remember of ever seeing it or looking for it. You would have to look very sharp to see it.

Q It is back on the hill above Quigley's house?

A Approximately 140 ft. above Quigley's house.

Q At the time you first saw that lode in the tunnel there of Quigley's, did you know that the mouth of that tunnel was inside of Grant's so-called placer claim as staked on the ground?

MR. STEVENS: Objection on account of assuming on the part of counsel that it was.

MR. ROTH: At the time you first saw the mouth of that tunnel, did you know that the mouth of the tunnel was inside of that placer claim as it was staked?

A —Mr. Quigley—(interrupted)

(objection by plaintiff on account of asuming that it was inside of placer claim. Mr. Roth withdraws question.)

Q You have a dotted line here in colored ink which seemingly marks the exterior boundaries or side lines of a claim which you have marked the "Hillside Lode Claim." What do those dotted lines represent?

A They represent 25 ft. each side of the supposed lode.

Q How did you get the supposed lode and locate it as an engineer?

A From back siting Mr. Quigley's location.

Q How far did you take back site of Mr. Quigley's location?

A Up to discovery post from the mouth of the tunnel.

Q To discovery post?

A Yes.

Q And after you extended that line from the mouth of his tunnel—I mean from his discovery post through the mouth of the tunnel—that represents the center—that line extended would be the center of these dotted lines you have there?

A Correct.

Q And that as you have it there, is the true direction of the strike of Quigley's lode?

A Correct.

MR. STEVENS: Providing the lode runs straight.

MR. ROTH: We object to counsel testifying.

Q Mr. Friedrich, this point you have marked here, "Campbell and Tobin shaft" is directly in line with this line you have made there as the strike of Quigley's lode?

A No sir.

Q How far off is it?

A Ten feet.

Q Do you show it 10 ft. off?

A Just about.

Q You show it about 10 ft. off?

A Approximately.

Q Do you know where this so-called Hillside Lode Claim of plaintiff's here goes after it goes off his Hillside Bench Claim?

A No sir, I do not.

Q I understood you to say in response to Mr. Stevens' that that was the claim of Jack Hamilton-you know it because Jack Hamilton took and showed you the stakes. That is the placer claim of Jack Hamilton?

A Yes.

Q And this so-called lode claim of plaintiff extends over the placer claim?

A It must if it is staked 1500 ft. long.

Q Do you know that it goes over Hamilton's placer claim?

A I do not.

Q Do you know that it does not?



A No sir.

Q You don't know one way or the other?

A No sir.

Q Why did you set that post which is marked No. 5 there?

A To mark the point of 660 ft.

Q Why did you mark that point?

A For the simple reason that Mr. Grant claimed it, and I marked approximately where it should have been.

Q Is that why you did it? Didn't Mr. Grant tell you to do it?

A He told me nothing of the kind—Mr. Grant was willing—but I merely wanted to mark the 660 ft. point.

Q When you did mark it, what did Mr. Grant say?

A I don't remember any conversation—he wasn't there, he went out to get witnesses.

Q You did that at your own suggestion?

A I did.

Q These other points you have marked here, hole 10 ft. deep, hole 8 ft., hole 7 ft., hole 6 ft., deep, and so on—those holes you say they were there approximately in the—,interrupted)

A As they are placed.

Q They are all within what distance of this point you have marked there that would indicate the strike of Quigley's lode? How close are they to that line?

A Some are out as far as 170 ft., others within 12 ft. or so. Quite a number are right close and oth-

ers are farther out from the lode, some are 70 ft., some are 10 ft., 12 ft., and 27 ft.

Q How many holes did you find besides the Campbell and Tobin shaft?

A Nine, or ten inclusive of Campbell and Tobin.

Q Now this distance between post No. 3 and corner No. 5 you computed by triangulation?

A You mean this distance between here and here?

Q No., between 3 and 5

A Correct.

Q What was the degree of this angle up here at corner post No. 4?

A 84.30

Q What was the angle at corner No. 5 of that triangle that you were triangulating?

A What angle do you mean?

Q Corner No. 5.

A I have it at home—not here—all figures that I copied.

Q Do you remember the number of degrees?

A In the neighborhood of five, not exact to the second, but could give it correctly.

Q Now you say those measurements that you say are accurate, you mean by that your chainman measured and called out the measurements?

A Correct.

Q You didn't go and check up each measurement as made?

A No sir.

Q You noted as the chainman called?

A Chainman gave measurements as we went

along—we set each point by instrument.

Q You stayed at the instrument?

A I had to stay at the instrument in order to line in the head chainman.

Q That is just exactly what I am getting at. In measuring up that hill, how did you take measurements to get them accurate?

A Would get them as near horizontal as possible.

Q You didn't have a plumb there to plumb with?

A No sir.

Q You didn't drive any stakes to mark the point from which you broke chain?

A Yes, we had small willow stakes made for the purpose to stake each point.

Q The rear chainman picking them up as they went along?

A Correct.

Q Have you notes there showing how far they went without breaking chain—how close breaks were together?

A 100 ft.

Q I am talking about how they broke chain between points.

A They didn't break chain anywhere, took a 100 ft. chain all the way through.

Q Did you take any levels of that hillside?

A I did.

Q What was the result of leveling there?

A The level at this point, northwest from post No. 1 to post No. 4 is thirteen degrees on the vertical angle.

Q What is the difference in elevation?

A I haven't got the figures here, but have them home.

Q Could you approximate it for me?

A Not now.

Q You say how many degrees?

A Thirteen degrees.

Q Even?

A Even.

Q To post No. 4?

A Instrument setting at initial post to post No. 4.

Q Did you take the elevation between the Campbell and Tobin shaft and the Quigley tunnel?

A No sir.

Q Did you take any other elevations there on that line between post No. 1 and post No. 4?

A No sir.

Q How did you take that measurement of that angle?

A By measuring in on vertical arc of my instrument. of course, taking point seven above, measuring telescope on front.

Q What did you take site on up there?

A On stake—on bottom of stake, the instrument was setting very close to the snow at the time.

Q Wasn't that stake on a rock pile?

A Yes.

Q Which stake?

A Stake No. 4.

Q Would that represent the true elevation—I mean the true slope of that hill?

A No, that is an average from post No. 1 to post No. 4.



Q But post No. 4 stuck up on a cliff of rock?

A Yes, elevation rises gradually until it gets up to Quigley's house where it begins to get steeper. Post sets at bottom of cliff.

Q Now that stake at corner No. 4, did that—how did that appear with reference to age?

A Approximately the same as post No. 3.

Q Now what—you have given me what was written on stake No. 4. Was there any reason—from the appearance of the timber, was there any reason why whatever was marked there within the last two years should not be on there now?

A No.

(Plaintiff objects as incompetent testimony and Court agrees that it is hardly competent and sustains objection)

Q How many places on this—at the time you did this survey here did you see where Quigley's lode was exposed?

A It is only at the discovery, and the mouth of the tunnel it isn't visible—the discovery is the only one you can see lode exposed. I haven't seen it any where between.

Q Did you make any effort to find out?

A No sir.

Q How is the slope between what you have marked No. 2 post and No. 3 post?

A Twenty degrees and two minutes.

Q That is pretty steep?

A Yes sir, very steep.

Q Did you take any elevations to show how high this No. 2 post is above Moose Creek?

A No, I did not take that elevation.

Q You didn't take any elevations down to Moose Creek?

A No sir, at no time.

Q You couldn't give us an idea?

A No, only judgment.

Q Did I understand you to say that Quigley's house is below this line that you have marked between corner No. 5 and corner No. 3 post?

A It is just about, I think 8 ft. or 10 ft.—I couldn't say positively—below that line.

Q How much of that did you estimate—how much of the placer claim which is designated, "Hill-side Bench Claim" is outside of the Red Top Lode Claim and the claim of these defendants?

A No, I have not.

Q You made no estimation?

A No.

Q And outside of those holes you have on there, you found no evidence of work having been done on that placer claim?

A Only the building of a cabin marked on there. The only work I found done is marked there.

MR. ROTH: That is all.

### **Re-direct Examination**

BY MR. STEVENS:

Q Did I understand you to state in answer to Mr. Roth's questions that the writing on any of those stakes which apparently mark the boundary lines of the placer claim ought to be just as legible now as when first put there?

A Not as distinct, but it ought to be nearly as

visible, but not as good as then.

Q Do you pretend to say how long writing ought to be plain on a stake when exposed to Alaska weather?

A I wouldn't think it would last for years.

Q I want to know this—whether you know how—whether or not it might depend upon which side the writing was—whether on the south, or north, east or west?

A That would make a difference—weather conditions make a difference.

Q Wouldn't it make a difference how long the writing would remain legible as to whether or not the writing was put there on an old, dead piece of timber or stake, or whether it might have been written on a fresh blazed, or a green tree?

A Oh yes, naturally it would.

Q You don't pretend to say whether it was a green or an old and dry stake when placed there?

A No, I wouldn't make any statement whether it was green or dry when put there, but it looks as though it was dry.

Q Looks as though it was dry. Explain what you mean—how can you tell by the looks of a stake several years old whether it was green when put there or whether it was dry when put there.

A If it is spruce, the bark will dry and adhere—if a dry one, it usually peels off—peels off if an old dry tree but if it is put there green under those conditions, it will stick and adhere for some time.

Q If it was put there green with the bark on of course in time the bark will dry and peel?

A Yes, but it will adhere much longer than if it was already dry.

Q Take as an illustration post No. 3. Do you know whether that was green when put there or dry?

A I wouldn't say.

Q Do you know whether it is cottonwood or spruce?

A Spruce.

Q What kind of wood was in No. 4?

A No. 4 was spruce the same as the other.

Q Do you know whether it was green or dry when put there?

A Couldn't say whether it was green or dry.

Q Which will last longer so far as being legible is concerned, writing put on a green post or writing put on a dry post?

A Have had no experience in that—wouldn't give any judgment.

Q You don't know anyone in this country who really knows?

A No.

Q Can you tell us approximately where this Haney road comes with reference to the placer claim—does it come from up the hill down?

A It comes from the eastward towards this placer claim and down the hill.

Q Is it the same road used by Tom Aitken in hauling ore from up hill?

A It comes in and joins somewhere in the placer claim.

Q Where the two roads join?



A Yes.

Q Do the two roads join as they come down a steep hill?

A No, it is pretty flat down where they join.

Q State whether or not it is a fact that the lower portion of this Hillside Bench Claim is pretty flat compared with the balance.

(Defendants' counsel objects to question and is sustained by the Court)

Q As I understand you from answers to Mr. Roth, you spoke of taking the elevation from initial post to post No. 4 which I believe you said was some thirty degrees?

A Thirteen degrees.

Q And that representing an average? What do you mean?

A It rises higher in the rear than in the front.

Q Where does it start approximately between post No. 1 and post No. 4—where does it start to rise steep?

A A little below Mr. Quigley's house.

Q Do I understand you—it is comparatively level or a gradual rise from the initial stake up to about Quigley's house?

(Defendants' counsel objects to question and Mr. Stevens agrees to refrain.)

Q What do you wish me to understand as regards the topography of that claim from the initial stake to Quigley's house?

MR. ROTH: We object—

COURT: Let the witness describe it.

A It is approximately fairly level for the first

150 ft., from there it gradually rises steeper and steeper.

Q Until it gets to Quigley's house?

A Clean up there.

Q Between the initial stake and Quigley's house?

A Between the initial stake and Quigley's house—it is fairly level for 150 ft. then it rises steeper

Q Commencing from where it rises, it is very much steeper just below Quigley's house up to corner post No. 4?

A Very steep.

Q Describe the slant or the topography of the ground between post No. 2 and post No. 3.

A For 200 ft. approximately it is comparatively level, from there it rises steeper and steeper until it reaches post No. 3.

Q Mr. Friedrich, in answer to Mr. Roth's questions you described this line from Quigley's discovery down to the mouth of the tunnel as being the center of the supposed vein, did you not?

A Yes sir.

Q And from Mr. Quigley's lode you extended that line in a straight line?

A Yes sir.

Q You haven't any knowledge whether that ledge runs straight or not?

(Mr. Roth objects to question as leading and is sustained by the Court)

Q Have you any knowledge whether or not the center of the vein would be in a straight line?

A None whatever.

Q You have also extended that same line—imaginary line—supposed to be the center of the ledge, straight down to indicate the center of Billy Grant's Hillside Lode Claim, have you not?

A Yes sir.

Q I presume the same is true—you have no actual knowledge what direction the vein takes?

A None at all.

Q You have no knowledge that the vein extends there at all, have you?

A No sir.

Q In answer to Mr. Roth's questions you have stated that the Grant quartz location indicated here as the Hillside Lode runs entirely through the placer claim adjoining, which would be Hamilton's location, and goes through into probably the next placer claim?

A It would be probable. I haven't gone that far—haven't examined it and don't know.

Q Grant's location runs 1500 ft. down hill in a southwesterly direction from the point of discovery, does it not?

A I do not know.

Q Did you examine Mr. Grant's location notice?

A I didn't examine it.

Q If it called for 1500 ft. down hill, it would go down through and into those other claims, wouldn't it?

A It would have to, yes.

Q If Campbell and Tobin's quart claim which they indicate here as their location runs 1470 ft. down hill along the supposed strike of the lode, it would

also run through these other placer claims?

MR. ROTH: We acknowledge that.

MR. STEVENS: That is all.

MR. ROTH: That is all.

Session 10:00 A. M. Thursday, February 2nd, 1922

WILLIAM GRANT, called as a witness in his own behalf, after being duly sworn, testified:

**Direct Examination**

BY MR. STEVENS:

Q State your name.

A William Grant.

Q Are you the plaintiff in this case?

A Yes sir.

Q Do you know the defendant, Mr. Campbell?

A Yes sir.

Q About how many years have you known him?

A Five or six years.

Q Do you know Mr. Tobin?

A Yes sir.

Q How long have you known Mr. Tobin?

A Three years.

Q How old are you?

A Sixty-two.

Q Where were you born?

A Scotland.

Q When did you come to this country?

A In '82.

Q Are you a citizen of the United States?

A Yes sir.

Q How long have you been a citizen?

A Since '92.



Q Were you naturalized under the laws of the United States?

A Yes sir.

Q Where?

A Aspin, Colorado.

Q In 1892?

A Yes sir.

Q What has been your chief occupation for several years past?

A Mining.

Q When did you come to Alaska?

A In 1900.

Q Have you been in Alaska ever since?

A With the exception of two years in Dawson and nine months outside.

Q What years were you in Dawson?

A '91 and '92.

Q You mean 1901 and 1902?

A Yes sir.

Q How long have you lived in the Tanana Valley country?

A Nineteen years.

Q Have you been engaged in mining and prospecting ever since you have been in Alaska?

A Yes sir.

Q Where did you come from when you came to Alaska?

A Came from Cripple Creek, Colorado.

Q How long did you live in Colorado—about?

A Seventeen years.

Q What was your business while living in Colorado?

A Mining—working in mines and prospecting.

Q What kind of mines?

A Quartz.

Q Did you ever have any experience in placer mining or prospecting in Colorado?

A No sir.

Q There is very little placer in Colorado?

A Yes sir.

Q Chief mining in Colorado is quartz?

A Yes sir.

Q Have you had any experience in placer mining in Alaska?

A Yes sir.

Q Have you had experience in quartz mining in Alaska?

A Some, yes.

Q Where have you been engaged in quartz mining in Alaska?

A With Mr. Rhodes.

Q In the Rhodes-Hall mines?

A Yes, at the head of Cleary.

Q How long were you in the Rhodes-Hall mines?

A Two years.

Q In what capacity?

A As common laborer—miner.

Q Did you have experience in various lines—various branches of quartz mining?

A Yes sir.

Q Where do you live now?

A In Fairbanks.

Q Have you been living in the Kantishna?

A Yes sir.

Q How long were you in the Kantishna country?

A Two years and a half.

Q What have you been doing since going in to the Kantishna country?

A I have been mining for Mr. Aitken—T. P. Aitken.

Q What kind of mining was Mr. Aitken doing?

A Quartz mining.

Q In what capacity did you work for Tom Aitken in the Kantishna?

A Had charge of it.

Q You had charge of his works?

A Yes sir.

Q In other words, were you superintendent or foreman, or what did you call yourself?

A Yes, I was foreman working as boss.

Q Were you interested in any of his enterprises there except as an employee?

A No sir.

Q You received a salary for your labor?

A Yes sir.

Q You had no interest in any of Mr. Aitken's ground or option?

A No sir.

Q Then how long about have you been engaged in mining any place?

A For forty years or over.

Q Over forty year?

A Yes sir.

Q You, of course, are acquainted with the ground —the property in dispute in this case, are you not?

A Yes sir.

Q Have you any other mining claims or mining property excepting the property in dispute in this case in the Kantishna?

A Yes sir.

Q Is it quartz or placer?

A I have quartz and placer claims.

Q One quartz and one placer besides these?

A Yes sir.

Q Is that all?

A Yes sir, that is all.

Q Are they any where near this property?

A No, the quartz is on Copper Mountain about twenty five miles, and the placer is up Friday, towards the head of Friday Creek.

Q How far away is it from this placer claim?

A A mile and a half or two miles.

Q When did you first go upon the Hillside Bench Claim?

A The 10th day of September 1919.

Q How long had you been in the Kantishna country prior to September 10, 1919?

A Four months.

Q The ground in dispute I understand is on the right limit of Moose Creek, is it not?

A Yes sir.

Q Did you know anything about the character of the surrounding ground or claims on Moose Creek or Friday Creek before September 10, 1919?

A Yes sir.

Q Did you know at that time whether any placer ground had been discovered and located?



A Yes sir.

Q When you went on this ground September 10, 1919, describe just what you did, if anything, relative to initiating title for a placer mining claim.

A I was on the hill coming down to Hamilton's to borrow a box of candles and coming down through the draw I seen some dirt that looked different from anything else.

Q Describe where that was.

A Coming down to Hamilton's cabin.

Q Where was Hamilton's cabin?

A On Moose Creek.

Q The right limit of Moose Creek?

A No, the left limit of Moose Creek.

Q Your placer ground is on the right limit, isn't it?

A Yes sir.

Q How far was Hamilton's cabin from the place that you went on the Hillside Placer claim?

A A mile and a half.

Q What I want you to do if you can is to describe where this draw was where you went.

A It isn't much of a draw, just a depression in the hill.

Q Have you examined this map, Plaintiff's Exhibit A?

A Yes sir.

Q I will ask you to examine Plaintiff's Exhibit A, which has been identified in this case, and state whether on that map you recognize the point which is indicated thereon as corner No. 1 post. Do you

recognize that?

A Yes sir.

Q Will call your attention to corner post No. 2.

Do you recognize that?

A Yes sir.

Q And corner post No. 3. Do you recognize that?

A Yes sir.

Q And corner post No. 4. Do you recognize that?

A Yes sir.

Q And a point down here called corner No. 5  
You recognize those points?

A Yes sir.

Q Within the area of those points in large letters  
is marked "Hillside Bench Claim". Does that represent  
the claim as originally staked?

A Yes sir.

(Mr. Roth makes objection on account of being a leading question. Court instructs that answer be stricken out. Mr. Stevens takes exception and exception allowed.)

Q If that map is correct with reference to those four corners which you say you recognize, would you be able to point out to the jury on that map the location or approximately the location of the place that you spoke of as doing some work or prospecting on the placer Claim?

A Yes sir.

Q I call your attention to the red line there indicated on the map as being Quigley's location, also Quigley's discovery north of and outside of the boundaries of the placer claim according to the map,

and also the place designated on the map as being the mouth of Quigley's tunnel; coming on down southwesterly from that, I call your attention to the Quigley southwesterly end line. If the map is approximately correct, are you able to point out the place where you went on about September 10, 1919. Take the pointer so the jury can see and point out as near as you can the location that you did any prospecting there on September 10, 1919.

A Here in front of "Cabin" (pointing)

Q That place marked "cabin" you recognize as being approximately in the proper location?

A Yes sir.

Q That cabin was not built at that time, was it?

A No sir.

Q When did you build it?

A Last fall.

Q The fall of 1921?

A Yes sir.

Q Prior to that time did you have a tent about the same location?

A Yes, 5 feet above the cabin uphill.

Q When you went there September 10, 1919, did you do any prospecting or panning?

A Yes, I prospected and panned.

Q Where?

A Right in front of the "cabin", I panned there, dug two or three holes eighteen inches or a foot deep—there was gold in both pans.

Q Was that all the panning you did that day?

A All the panning I did.

Q That is considerable distance south from what

is designated on the map as the southerly end line of Quigley's location?

A One hundred feet.

Q It is below what is now Quigley's claim?

A Yes sir.

Q About how many pans did you pan?

A I panned three.

Q What was character of the substance that you panned?

A There was quite a bit of concentrated gold.

Q What was the formation generally of the material that you panned?

A Mostly broken up schist and slide—very rough matter, some gravel through it.

Q Any muck?

A A little. It was a high point so there was very little muck.

Q Any sand and gravel?

A Some sand and gravel.

Q Broken up schist?

A Yes sir.

Q You panned three pans. Describe whether or not you found any gold in the first pan.

A I found gold in all of them.

Q How much gold about did you find in those pans?

A There was a couple of pans that went fairly good—had no way of weighing it but would judge it went over one-half cent, and the other was color.

Q You mean the pans you judge would go over one-half cent each, and the third pan you got color?

A Yes sir.



Q What did the gold look like.

A Well, it looked like most of it—was fairly coarse and fairly rough.

Q At that time you stated you knew something about the character of the country in the vicinity of those creeks?

A Yes sir.

Q Will ask you to state whether or not you knew at that time that any placer gold had been found in substantial quantities or paying quantities on Moose Creek.

A Yes, from what I understand there has been men working there the last fifteen years.

Q You knew that at that time?

A Yes, at that time.

Q Had there been any work done on Friday Creek?

A Yes, Friday Creek has been pretty well worked out.

Q How long then had it been worked?

A Since the strike in 1905.

Q For placer purposes?

A Yes sir.

Q Was the ground on Moose Creek that you spoke of worked for placer purposes?

A Yes sir.

Q About how far distant was the down hill side line of your placer claim—or your initial stake we will say—how far is it from your initial stake, approximately, straight down to Moose Creek?

A From Moose Creek proper, I judge it is close to half a mile—between a quarter and a half mile

to Moose Creek proper.

Q How far was initial stake, going in a southerly or southwesterly direction—how far was initial stake from Friday Creek straight across?

A 350 ft. or 300 ft.

Q You know now the location of the claim adjoining you on the south, do you?

A Yes sir.

Q What is it called?

A The Horse Shoe Bench.

Q And who owns that Horse Shoe Bench?

A Mr. Hamilton.

Q Was Mr. Hamilton's placer claim a creek claim or a bench claim?

A Bench claim.

Q Was it the first or second bench.

A The first bench.

Q Your claim is the second bench?

A Yes sir.

Q Was there any claim adjoining your claim towards Friday Creek.

A Yes sir.

Q Was that a creek claim or a bench claim?

A A creek claim.

Q Counting from Friday Creek your claim would be the first tier on that limit. Is that true?

A Yes sir. The end of the claim butts up towards Friday, but the claim is extended up Moose.

Q There is a junction down considerably off your claim where Friday Creek runs into Moose Creek. Is that true?

A Yes sir.

Q Now, Mr. Grant, I ask you as a mining man, a man of mining experience, whether or not at the time that you panned those three pans and found gold at the location you have described, did you take into consideration, as a prospector, the character of the ground, its formation, the location with reference to other placer claims, and the amount of gold you found in the pans—did you take it all in consideration?

A Yes sir.

Q Will ask you whether or not in your judgment an ordinarily prudent man, not necessarily a miner, after having found the amount of gold that you found in the locality you found it, and taking into consideration the surroundings and character of the country—whether an ordinarily prudent man would be justified in expending further labor or money in developing the property for placer purposes?

A He would.

Q Did you locate the ground?

A Not then, no sir.

Q I asked if you located it?

(Mr. Roth objects as calling for conclusion of witness, and Mr. Stevens agreed to modify question.)

Q Did you at any time thereafter take any further steps with reference to locating the ground?

A Yes sir.

Q When did you take the next step to locate that ground as a placer claim?

A April 19, 1920.

Q Explain to the jury why it was you did not locate, or attempt to locate or proceed to locate this

ground as a placer claim until after the lapse of several months.

MR. ROTH: Objected to on account of being irrelevant, incompetent and immaterial.

COURT: It would be in order to show if he actually did locate the ground thereafter.

BY MR. STEVENS:

Q Describe what, if anything, you did in April 1920 with reference to making location of the Hill-side Bench Claim.

A I came down here to initial stake—(interrupted)

Q You mean the point indicated on the map as stake No. 1?

A Yes sir.

Q What did you find there, if anything?

A I found a stake.

Q What kind of a stake was there?

A A stake squared on four sides.

Q How high was it above ground, about?

A About four feet, I judge.

Q And about what was the diameter?

A Four or five inches.

Q What was its general appearance with reference to age?

A It was an old post.

Q Did it contain any writing?

A No sir.

Q What else did you do when you went there—was any one with you?

A Yes sir.



Q Who?

A Mr. Quigley and Mr. Hamilton.

Q Mr. J. B. Quigley?

A Yes sir, and Mr. Hamilton.

Q What Mr. Hamilton?

A John Hamilton.

Q They were with you at the initial post?

A Yes sir.

Q Was the John Hamilton, or Jack Hamilton, you speak of the man who is reputed to own Horse Shoe Placer Claim on the south?

A Yes sir.

Q Was Quigley the same Quigley that made the discovery and owns the quartz claim above?

A Yes sir.

Q State what occurred at that stake which is indicated on the map as stake No. 1.

A I wrote my name on it, located it, claiming—  
(interrupted)

Q Did you ascertain at that time whose stake that was?

A Yes sir.

Q Whose was it?

A John Hamilton's.

Q State whether or not John Hamilton at that time recognized it as one of his corner stakes to the Horse Shoe Claim.

(Mr. Roth objects account irrelevant, incompetent and immaterial. Objection over-ruled. Mr. Roth takes exception and exception allowed.)

Q I asked whether or not Hamilton at that time

recognized and claimed that that was one of his corner stakes.

A Yes sir.

Q You have already stated that you wrote something on one side of the stake?

A Yes sir.

Q Which side?

A The side towards the Hillside Bench Claim.

Q The side facing the hill, or the northeast?

A Northeast.

Q Was Hamilton there when you wrote on the stake?

A Yes sir.

Q Did he make any objection to you adopting his stake?

A No sir.

Q Did he give you permission?

A Yes sir.

(Mr. Roth objects to question account irrelevant, incompetent and immaterial and wishes objection to stand before the answer. Objection admitted before the answer. but over-ruled. Mr. Roth takes exception and exception is allowed.)

Q Are you able to state in substance what you wrote on stake No. 1?

A Yes sir.

Q Tell us what you wrote, as near as you can, on that stake at that time.

A "April 19, 1921"—(Interrupted)

Q Mr. Grant, take your time, it is well known that it was not 1921 at all. Don't say anything you don't realize. Start again and tell us the substance

of what you wrote on the stake.

A "April 19, 1920, I claim 1320 ft. up Moose Creek to post No. 2 and 660 ft. up hill."

Q Did you give the claim any—(Interrupted)

A Was trying to think what I did put on it.

Q No one expects the exact language.

A It was staked for placer mining purposes.

Q Did you put your name on it?

A Yes sir.

Q What name did you put?

A William Grant, locator.

Q Did you put the name of the claim on it?

A Yes sir.

Q What name?

A Hillside Bench claim.

Q Did you state that was corner—state what corner it was.

A Yes sir, corner No. 1.

Q Did you indicate on the stake whether or not it was the initial stake?

A Yes sir.

Q What did you indicate?

A I wrote "initial stake of the Hill Bench Placer Mining Claim."

Q Did you put any arrows pointing in any direction?

A I put on two.

Q Describe which way they pointed.

A One pointed up hill and the other up Moose Creek.

Q Was that done in the presence of Quigley and Hamilton?

A I think so.

Q At any rate they were there when you first went down?

A They were there when I started to stake.

Q What did you do when you got through with initial post, or post No. 1?

A I followed them up to post No. 2.

Q Would that be up Moose Creek?

A Yes sir.

Q You went up behind Mr. Hamilton and Mr. Quigley?

A Yes sir.

Q How far behind?

A I was on snow shoes and they were quite a ways ahead.

Q Where did they go?

A To post No. 2.

Q Was there a post there?

A Yes sir.

Q Describe that post as near, as you can.

A That post was leaning about like that (indicating) towards Moose.

Q How long was it above the ground?

A Between three and four feet.

Q How big a stick was it?

A Over three inches in diameter.

Q Was it squared?

A Squared on four sides.

Q Did Quigley and Hamilton stop when they got up to post No. 2?

A Yes sir.



Q Did they wait there until you came up?

A Yes sir.

Q What was the appearance of that post with reference to age, if you know?

A There was nothing visible on it—looked as if it was weather beaten.

Q As though it had been there a long time?

A Yes sir.

Q Couldn't see any writing?

A No sir.

Q You may state whether or not Mr. Hamilton recognized or claimed that to be one of the stakes of his claim adjoining.

(Mr. Roth Objects account irrelevant, incompetent and immaterial. Objection over-ruled. Exception taken and allowed.)

A Yes, that was his other stake.

Q He recognized it as his other stake?

A Yes sir.

Q Did you write anything on that stake?

A Yes sir.

Q What did you put on it?

A "Stake No. 2, claiming 1320 ft. down Moose, 660 ft. up hill, for placer mining purposes"—also date

Q What date?

A April 19, 1920.

Q Did you put the name of the claim?

A Name of claim.

Q Did you put your own name on it?

A Yes sir.

Q Was Hamilton there when you wrote that?

A I don't know whether he was there or whether

he had gone.

Q Did he know you were adopting his stake?

(Mr. Roth objects account irrelevant, incompetent and immaterial. Objection sustained.)

Q Did Hamilton give you permission to use one side of his stakes?

(Mr. Roth objects account irrelevant, incompetent and immaterial. Objection over-ruled. Exception taken and allowed.)

A Yes sir.

Q On which side of the stake did you write?

A The up-hill side.

Q The side towards the inside of your claim?

A Yes sir.

Q Did you put any arrows on stake No. 2?

A Yes sir.

Q Describe what you put on there with reference to arrows.

A Two arrows—one pointing down and the other up.

Q What do you mean?

A Pointing down Moose—down stream.

Q Which way did it point—towards the initial stake?

A Yes sir.

Q And the other pointing up in the air?

A No, pointing up hill.

Q Those two stakes as I understand were established April 19, 1920. Did you do anything more that day with reference to staking?

A No sir.

Q Did you at that time measure the distance

from stake No. 1 to No. 2?

A No sir.

Q When did you take any further steps relative to staking the claim, if you did?

A The next day.

Q What did you do the next day?

A Went to corner No. 4.

Q That would be the place indicated on Plaintiff's Exhibit "A" as corner No. 4 post?

A Yes sir.

Q How did you get up there? Where did you come from and where did you get up?

A Was up on hill and came down.

Q Up hill here?

A Yes sir.

Q And came down hill. Did you travel the distance between post No. 1, your initial stake, up to No. 4 that day?

A No sir.

Q Did you measure or calculate the distance from your initial stake to No. 4?

A I guessed.

Q You didn't measure?

A No sir.

Q What kind of post did you establish there, if any? I mean post No. 4.

A That is the largest post in the bunch—that was close to six inches and over 3 ft. above ground.

Q You mean six inches in diameter?

A Yes sir.

Q Was that a new post or an old one?

A A new post.

Q You put that post there?

A Yes sir.

Q Did you square it or blaze it?

A Squared it.

Q On four sides?

A On four sides, yes.

Q Did you write anything on that post?

A Yes sir.

Q What did you write—the substance of it?

A Wrote the date, name of the claim—

Q What claim?

A Hillside Bench Claim—date of location and my name—

Q Did you put the number of the post?

A No. 4, yes.

Q Which side of the post did you put that on?

A The lower side.

Q The side towards the center of your location?

A Yes sir.

Q How did you fasten the post—the ground was frozen, wasn't it?

A Yes.

Q How did you fasten the post?

A That post, I took it up there where there was a cliff of rock and there was slide there and I took it up there and put it in slide and built rocks around. That is one reason why claim is so wide.

Q You took it up to a point where you could find slide rock to pile around it and hold it up. You couldn't drive it in the ground?

A No sir.

Q Is that post still remaining there?



A Yes sir.

Q Has it remained there ever since in the same condition you put it?

A That post has never been moved—it remains the same as I put it up.

Q Still surrounded by rocks?

A Yes sir.

Q Did you put any arrows on that post?

A Yes.

Q What arrows did you put on there. Describe them.

A One pointing down to initial post and the other pointed up stream to post No. 3.

Q As I understand you, at the time you put post No. 4 in, or corner post No. 4, you hadn't yet established post No. 3?

A No sir.

Q Have you described all that you did at post No. 4 at that time?

A Yes sir.

Q What else did you do, if anything?

A Went along hillside to post No. 3.

Q The same day?

A Same day.

Q How did you get over to post No. 3?

A I crawled along the hillside.

Q The hill is quite steep?

A Yes sir.

Q Did you have snowshoes on ?

A No sir.

Q Did you measure the distance from post No. 4 down where you stopped at post No. 3?

A No sir.

Q Did you calculate what the distance would be?

A Yes

Q It was a guess or supposition?

A Yes.

Q Did you travel the distance from post No. 2 to post No. 3?

A Not that day, no.

Q When you got to the point that you established as post No. 3, could you look back and see post No. 4?

A Yes sir.

Q Did you see it?

A I did, yes sir.

Q Could you at that time look down and see post No. 2?

A I could see all.

Q You did see post No. 2?

A Yes sir.

Q Did you calculate the distance would be about 660 ft. from where you stuck post No. 3 you had established down to post No. 2?

A Yes sir.

Q You calculated approximately 660 ft?

A Yes sir.

Q State whether or not you did at that time establish what is now indicated on the map as corner No. 3 post?

A Yes sir.

Q What kind of post did you put there?

A The same as No. 4, but smaller. Tied it to a bush.

Q How high was it above ground?

A Over three feet.

Q And how much in diameter?

A Three or four inches.

Q Did you square that stake?

A Yes sir.

Q Did you write anything on that stake?

A Yes sir.

Q What did you write?

A "April 20, 1920, northeast corner post of Hill-side Bench Placer Mining Claim."

Q Did you give it any number?

A No. 3, yes.

Q Did you sign your name?

A Yes, William Grant, locator.

Q Could you drive that in the ground?

A No sir.

Q You say you tied it to a bush?

A Tied it to a bush and there were some rocks alongside thawed out a little and got rocks and put around.

Q What did you tie it with?

A A String.

Q What else did you do that day, if anything?

A Nothing, went back up hill.

Q At the time you wrote on initial stake there as you have described, for the purpose of refreshing your memory, did you put on the initial stake the date of your discovery?

A I don't remember.

Q You put the date of posting the notice?

A Yes sir.

Q What other steps, if any, did you take with reference to perfecting your location?

A Not any.

Q That is on the ground. You may state whether or not thereafter you filed a record in the Kantishna Mining District, or mining precinct, a certificate of location.

A Yes sir.

Q I hand you a paper, Mr. Grant, containing long-hand writing and ask you to examine it. (Hands him paper) State whether or not that is written in your handwriting.

A No sir.

Q State whether or not it is your signature.

A Yes sir.

Q After reading it state whether or not you recognize that as being your location certificate for the placer claim in controversy in this suit. Before answering, turn it over and see the endorsements on the back. (Mr. Grant reads paper)

A Yes, that is what is on the post that—(Interrupted)

(Mr. Roth objects to answer as not being responsive to question. Court orders answer stricken out)

Q I asked you if you recognized that as the certificate of location that you filed on record.

A Yes sir.

MR. STEVENS: We offer this in evidence.

MR. ROTH: We object to the introduction of this document in evidence on the ground that same is irrelevant, incompetent and immaterial, not being in



accordance with the requirements of the Session Laws of 1915 which provide what a certificate of location must contain before a placer mining claim can be a valid placer mining claim. This is what I consider a very important objection and if the Court has any doubt on the proposition at all, I would like to be heard upon the law on this proposition. I consider it absolutely vital and consider it as not complying with the law at all. I would like to argue the proposition, if the Court has any doubt about the position I take.

COURT: What particular part of the notice do you object to?

MR. ROTH: I object specifically on two grounds; that it does not contain, does not set forth the description with reference to some natural object, permanent monument or well-known mining claim, together with a description of the boundaries thereof, so far as applied to the number of stakes or monuments; that is one of my specific objections. And the other is, it does not contain the date of the posting of the location notice. Those are two grounds. I have the authorities on the first ground I have stated that are absolutely in point—have been determined by Courts, and in my mind, under the law there is no question but that that notice of location, or certificate of location, does not comply with the law under decisions of the state courts and Supreme Court of the United States.

(Argument of the point admitted, and jury is excused until 2:00 P. M. during argument. Jury returns at 2:00 P. M. but is further excused until ar-

gument completed. 3:30 P. M. argument completed and jury returns. Court over-rules Mr. Roth's objection, allowing him an exception and notice of location is admitted in evidence and marked "Plaintiff's Exhibit B."

WILLIAM GRANT, re-called as witness in his own behalf, being heretofore duly sworn. testified:

**Direct Examination, (Continued)**

BY MR. STEVENS: (Recital of Plaintiff's Exhibit "B".)

"Notice of Location of Placer Claim.

"Notice is hereby given that I, Wm. Grant, "have discovered placer gold within the limits "of this claim and have this day posted this notice of Location at the point of discovery. I "claim 1320 feet in length by 660 feet in width "as marked on the ground, for placer mining "purposes. This claim shall be known as placer "mining claim, Hill Bench, opposite and on the "East side of Horseshoe placer mining claim "on the Right Limit of Moose Creek, Kantishna "precinct, Territory Alaska.

"Discovery made Sept. 10, 1919. Location notice "posted April 1920.

"Witness:

Wm. Grant  
Locator".

J. Hamilton.

(Endorsement)

"No. 2885

"District of Alaska

"Fourth Judicial Division,—ss.

"

Filed for record at request of

"Wm. Grant, on the 12th day of July 1920 at—  
"min. past 4.30 P. M. and recorded in Vol. 1,  
"Gen., page 58.

" Kantishna Recording District.  
(SEAL) C. Herbert Wilson. Per L. E. W.  
Recorder."

BY MR. STEVENS:

Q Mr. Grant, This location certificate states that it is opposite and on the east side of Horseshoe Mining Claim on the right limit of Moose Creek, Kantishna Precinct. State whether or not the Horseshoe claim referred to in your location notice was or was not at that time a well known claim.

(Mr. Roth makes objection account question leading and suggestive. Objection sustained. Exception taken and allowed.)

Q I believe you have already stated that the Hamilton claim you tied on to was known as the Horseshoe Mining Claim?

A Yes sir.

Q Or Horseshoe Placer Claim?

A Yes sir.

Q The two stakes you tied on had the appearance of having been old stakes?

A Yes sir.

Q Did you know at the time whose mining claim it was—the Horseshoe claim—at the time you located?

A Yes sir.

Q Whose?

A John Hamilton's.

Q How long before that time did you know that

such a claim existed—about?

A I knew it existed in September before that when I made my discovery, but didn't know where it was.

Q You didn't know where the lines were?

A No.

Q How did you know it existed?

A I heard them talking about Hamilton's Bench.

Q You heard who talking?

A The people—most everyone understood there was a claim there.

Q The people generally understood and referred to that Hamilton Bench as being a placer claim?

A Yes sir.

Q You may state if you will—you say you knew the Hamilton Bench Claim, or the Horseshoe Claim, was in existence at the time you made your discovery in September 1919?

A Yes sir.

Q Did you know just where Hamilton's lines were then?

A No sir.

Q State whether or not that was the reason you did not locate at that time.

(Mr. Roth objects account leading and suggestive. Objection sustained)

Q Will you state at this time why it was you didn't stake or try to make location after your discovery of September 10, 1919?

(Mr. Roth makes same objection which is over-ruled. Takes exception and exception allowed.)

Q State why it was you didn't locate the claim



immediately as soon as your discovery of September 10, 1919.

A The reason I didn't was that I didn't know where Hamilton's lines were.

Q What difference would that make?

A I didn't want to go and locate his ground, and went to look for his stakes—for this stake. (pointing to map)

Q You are pointing to stake No. 1?

A Yes.

Q And there was no writing on it?

A It was a squared stake but no writing.

Q What else did you do?

A Went along up to the other one.

Q What else did you do?

A Didn't do anything—went home.

Q That was in September?

A Yes.

Q What did you do, if anything, in an effort to find out where Hamilton's location was?

A Nothing then—he was in Fairbanks then.

Q Hamilton was in Fairbanks in September 1919?

A Yes sir.

Q You were in Kantishna?

A Yes sir.

Q What did you do, if anything, regarding it when Hamilton came in—into Kantishna?

A I went over to him and asked him to come and show me the lines of the Horseshoe placer claim, and he said he would.

Q Did he?

A Yes sir.

Q What time was it?

A In the afternoon.

Q What date—about?

A The 19th of April.

Q What year?

A 1920.

Q The same date you located it?

A Yes sir.

Q Was that the first time you had seen Hamilton to talk to him after September 10, 1919?

A I didn't see him September 10th.

Q But between September 10, 1919 and April 19, 1920, had you seen Hamilton to talk to him?

A No.

Q As I understand, the first time you saw Hamilton and talked with him to ascertain where the boundaries were and he went and showed you, and then you went and located alongside of him. Is that true?

A Yes sir.

Q You may state whether or not you could see the different corner stakes you have described when standing at initial stake.

A Yes sir.

Q How many stakes could you see standing at initial stake?

A Three, besides the initial stake.

Q Standing at stake No. 2, how many stakes could you see from there besides No. 2?

A The other three.

Q How was it standing at stake No. 3—what could you see in the way of stakes?

A Could see No. 1 and No. 2 plain, and No. 4 you had to stretch up pretty well to see.

Q Standing at stake No. 4, how many could you see?

A Could see them all.

Q All the stakes you put there at the time of location was the four corners you describe. Is that true?

A Yes sir.

Q Describe to the jury why it was you could see from these various stakes—was it on account of cutting out of line, or on account of absence of timber or brush?

A It was open country.

Q There was no timber there?

A No sir.

Q No brush to interfere with the view?

A No brush.

Q About when did you do the first work on the ground?

A You mean outside of making discovery?

Q I mean after location.

A It was November 3rd.

Q What year?

A 1921.

Q 1921?

A Yes, 1921.

Q What work was that—who did the work, do you know who did the work?

A Yes sir,—O. M. Grant.

Q Do you know O. M. Grant's signature?

A I don't know.

Q You wouldn't know his signature?

A Have seen it several times, I think I would.

Q There is a certified copy of some records—just examine. (Hands him paper) Mr. Grant, I want you to examine that to refresh your memory and state whether it was 1921, or was it 1920? Didn't Mr. O. M. Grant do that work in 1920?

A Yes sir.

Q The same year you located the claim?

A Yes sir.

Q Did you tell him where to go to do the work?

A Yes sir.

Q What did you tell him?

A I showed him where to sink.

Q Did you take him on the ground?

A Yes sir.

Q Did he sink where you told him to?

A Yes.

Q Point out on the map where he did that work to your own knowledge.

A I told him to sink the first hole twenty-five feet below Quigley's line and line up the lead as well as he could and he would stand two chances.

Q Two chances of what?

A Of a place where to strike the lead.

Q Had Quigley made a discovery before that time of a lode claim?

A Yes sir.

Q State whether or not Quigley's discovery shaft is approximately where indicated on the map. Do you know?

A That's the correct location.



Q Had Quigley, so far as you know, made any other discovery than the one indicated on his discovery shaft?

A He had several holes—I don't know whether—  
(interrupted)

Q So far as you know he had no other than the discovery made above your claim. Is that right?

A No, that is right.

Q Had Mr. Quigley started to run his tunnel—you know where the mouth of Quigley's tunnel is?

A Yes sir.

Q Had he started to run that tunnel before O. M. Grant went there to do assessment work on your claim?

A I don't remember—tunnel was set—was started before—

Q Before O. M. Grant went to do assessment work?

A I think so.

Q Do you know whether or not Quigley had gone down any considerable depth in the tunnel?

A I don't know—I was in the tunnel, but I don't know.

Q Counting the holes as indicated on the map, you will see ten holes.

A Yes sir.

Q Have you seen ten holes on the ground?

A Yes sir.

Q Do you know who put the holes there?

A I know who put nine of them there.

Q Who put nine of them there?

A O. M. Grant.

Q Was that in November 1920?

A Yes.

Q Did you pay O. M. Grant for doing that work?

A Yes sir.

Q How much did you pay him?

A \$100.00.

Q About how deep were the holes?

A The first hole was 12 ft. deep.

Q The hole you refer to as the first hole—state whether that is the hole that is marked on the map as the Campbell and Tobin shaft?

A Yes sir.

Q There is a hole immediately to the right of this first hole, or the Campbell and Tobin shaft. Did you or O. M. Grant sink that hole?

A No sir.

Q Do you know who did?

A No, I didn't see anybody sink it.

Q Do you know when—about when that hole was sunk?

A I don't know the date.

Q I am not talking about the hour or exact date.

A It was between the time we left the first of March and the 20th of June.

Q What year?

A 1921.

Q Were you on the ground about the first of March 1921?

A Yes sir.

Q Was the hole there then?

A No sir.

Q Were you on the ground in June or the first

of July 1921?

A I was on the ground between the 25th of June and the 1st of July.

Q Was the hole there then?

A Yes sir.

Q Did you sink it?

A No sir.

Q Did any one sink it on your behalf or at your request?

A No sir

Q What was the appearance of that hole when you discovered it on your ground in June or July 1921?

A It was a fairly fresh dug hole.

Q How deep was it?

A Between five and six feet deep.

Q About how far was it to the right or to the eastward of your hole No. 1 there that is indicated on the map as Campbell and Tobin's hole?

A 12 ft. to 14 ft.

Q Do you know where the Campbell and Tobin hole is as indicated on the map? Is it the identical hole you say was the first hole sunk 12 ft. deep by Mr. O. M. Grant?

A Yes sir.

Q Did you ever see Campbell or Tobin down in that hole, or see them coming out?

A Yes sir.

Q When was that?

A Between the 25th of June and the first of July.

Q Did you see Campbell or Tobin have any windlass at that hole?

A Yes sir.

Q Did you see them excavating or raising any material from the hole?

A Yes sir.

Q What was the character of the material they raised that you saw?

A It looked like ledge matter.

Q Did it look like ore?

A No, not what I saw.

Q Did it look like float?

A Well, it looked like ledge matter—what would be alongside of ledge.

Q From part of the quartz rock outside of the vein?

A It was partly vein matter.

Q What time was it about when you saw Campbell and Tobin raising this material with a windlass out of that hole?

A What time was it?

Q Yes, what month or day of the month?

A Along between the 25th of June and the 1st of July.

Q 25th of June?

A Yes.

Q Then it was after they had made location on the ground?

A Yes sir.

Q Now, had Mr. Quigley made his location of what he calls the Red Top Lode Claim before Campbell and Tobin came there? Before they came on the ground?

A Yes.

Q Before Campbell and Tobin came on the ground, Mr. Quigley had located his claim?

A Yes sir.

Q How long before?

A Nearly a year.

Q Do you remember the time that Mr. Quigley built his residence as indicated on that map "The Quigley House"?

A Yes sir.

Q Do you remember the time he was excavating for the foundation?

A Yes sir.

Q The Quigley house is designated on the map as Quigley's residence. Do you see it? (Indicating the map)

A Yes sir.

Q Near Post No. 5 of the end line?

A Yes sir.

Q Is that about the true location of Quigley's residence?

A Yes sir.

Q With reference to Quigley's house—there to the right of that is "cache". Whose cache is that?

A Quigley's.

Q And to the right of the cache is marked "bunkhouse". Whose bunkhouse is that?

A Quigley's.

Q And near the Quigley tunnel—the mouth of the tunnel—is a house marked "blacksmith shop". Whose is it?

A Mr. Quigley's.



Q Of all those buildings, which was put there first?

A I don't know—either Quigley's house or the the blacksmith shop.

Q He put the house up before the cache?

A Yes sir.

Q And before building the bunkhouse?

A Yes sir.

Q So far as the three buildings below your line, as indicated, are concerned, Quigley built his house first?

A Yes sir.

Q Did you have any conversation with Mr. Quigley in regard to the location of that house?

A No sir.

Q Did you have any conversation in regard to the location of his excavation?

A Yes sir.

Q Describe to the jury about when it was, and where it was and just what was said and all that occurred between you and Mr. Quigley.

(Mr. Roth makes objection account irrelevant, incompetent and immaterial, but later withdraws objection.)

Q Go ahead and state what occurred between you and Quigley with reference to establishing that line.

A I came along—Mr. Quigley was excavating and I said, "Joe, you will soon have enough done for assessment." He says, "This is not on your placer." I says, "Oh, I thought it was." "No" he says "this is not on your placer." That was all

there was to it at that time.

Q Quigley didn't say whether the house he proposed to build—or he was just excavating?

A Yes sir.

Q Did he soon after build a house where he was excavating?

A Yes sir.

Q Did Quigley tell you he had measured from your initial stake up?

(Mr. Roth makes objection to question, but Court rules that witness may state what Mr. Quigley told him.)

A No sir.

Q You say up to that you hadn't measured that line?

A No sir.

Q But he informed you that where he proposed to build his house was outside the boundaries of your placer claim?

A Yes sir.

Q Then afterwards did Mr. Quigley put on these other two buildings indicated below the line there—the cache and bunkhouse?

A Yes.

Q When Mr. Quigley told you that the excavating he was putting in there was not on your placer claim, did you believe that statement?

(Mr. Roth objects as irrelevant, incompetent and immaterial, but Court rules that he may state facts.)

A I took Quigley's word for it—I knew the claim was too large.

Q You knew it was more than 20 acres?

A Yes—that corner stake was higher than it should have been on account of no place to put it.

Q You stated on the location notice that you claimed 1320 ft. long and 660 ft. wide?

(Mr. Roth makes objection on account of the fact already proven. Objection sustained.)

Q Was Quigley present at any time at your initial stake?

A Yes sir.

Q He was there when you staked it?

A Yes.

Q Did you ever have any controversy or argument with Quigley in regard to the width of the quartz location?

A No.

Q About the time or soon after the discovery of Mr. Quigley, did he or not establish the lower end line of Quigley's Red Top Quartz Claim?

A Yes sir.

Q Did you see stakes there that he placed defining the lower end line of the quartz claim?

A Yes sir.

Q And they are substantially located as indicated on the map?

A Yes sir.

Q You say that at the time Grant—O. M. Grant—went to do assessment work, Quigley's discovery shaft was down and location of Quigley's claim had been made. Is that true?

A Yes sir.

Q And his lower end line has been established?

A Yes sir.

Q And you don't know whether his tunnel had been started or not, but if not, there were some holes near there?

A Yes, I think the tunnel was started, but wouldn't swear to it.

Q And you went there to show Mr. Grant—O. M. Grant—where to start your first hole which you say is the same as the Campbell and Tobin hole—that was about how far below the lower line of Quigley's claim?

A 25 ft. below his center stake.

Q And what did you say in regard to the lining up from Quigley's discovery?

A I told O. M. Grant when he was doing the assessment for placer, he might as well line up with Quigley and he might strike the lead there.

Q Was there any known lead within the boundaries of your placer claim at that time?

A None at all.

Q Was there ever any known lead within the boundaries of your placer claim before or at the time that Campbell and Tobin went upon the ground?

A No sir.

Q Was there ever any known lead within the boundaries of your placer claim before Campbell and Tobin struck a lead in your hole here which is indicated as Campbell and Tobin shaft?

A No sir.

Q Your hole No. 1 which is the same as the Campbell and Tobin hole was down 12 ft. from the

surface?

A Yes sir.

Q Sunk by O. M. Grant?

A Yes sir.

Q After O. M. Grant got through sinking the hole 12 ft., did anybody else sink it any lower, excepting Campbell and Tobin.

A No sir.

Q Were you down at the bottom of the hole?

A Yes sir.

Q Could you—state whether or not that hole at the depth you sunk it, or at any time prior to Campbell and Tobin going there, did it or did it not disclose any vein or lode?

A At forty feet.

Q I am not talking about forty feet. You said you only run it down 12 ft.

A Yes sir.

Q You stated nobody sunk from the bottom of the hole except Campbell and Tobin?

A Yes sir.

Q I am asking whether or not the bottom of that hole, or any place in that hole so far as you sunk the 12 ft.,—did it or did it not disclose any vein or indication of a vein or lode?

A You mean 12 ft. down?

Q Yes.

A No.

Q Before Campbell went there?

A No.

Q Did it disclose any float that you know of below the surface?



A No sir.

Q You say that nine of these holes out of the ten were sunk by O. M. Grant for you?

A Yes sir.

Q Were they located about the same as they are located on the map?

A Yes sir. That is a good map.

Q They are all your holes, excepting the one hole which is immediately to the right of what is indicated as the Campbell and Tobin hole?

A Yes sir.

Q They are marked at various depths—some of them 8 ft., 6 ft. and 7 ft. and 10 ft. Are you able to state whether or not that is approximately correct—the depths of them?

A Yes sir.

Q When you started hole No. 1, which is indicated on the map as Campbell and Tobin's shaft, why didn't Mr. O. M. Grant continue sinking that shaft or some other shaft instead of sinking so many shafts to a short distance.

(Mr. Roth objects as irrelevant, incompetent and immaterial. Objection sustained. Exception taken and allowed.)

Q Mr. Grant, you stated that you showed O. M. Grant where you wanted him to sink that first hole?

A Yes sir.

Q And made a statement that you tried to line up what might be an extension of Quigley's lode?

A Yes sir.

Q You didn't know how deep the ground was

to bedrock?

A No sir.

Q Did you instruct Mr. O. M. Grant how far you wanted him to go down?

(Mr. Roth makes objection and is sustained. Exception taken and allowed.)

Q You stated you wanted to line up—that among other things you wanted to do the assessment work and have a possibility of striking a vein. Now why didn't you go deeper than 12 ft.?

(Mr. Roth makes objection on the ground of being irrelevant, incompetent and immaterial. Objection over-ruled. Exception taken and allowed.)

A I couldn't get any one to go on the windlass to put it down.

Q You mean you couldn't hire any one to help Mr. Grant with a windlass at that particular time?

A No sir.

Q State whether or not 12 ft. is about as far as a man can throw out of a hole without a windlass.

A It is, yes.

Q I believe you stated you paid O. M. Grant \$100.00?

A Yes sir.

Q As a mining man, state to the jury whether or not the work that Mr. O. M. Grant did there in November 1920 was reasonably worth \$100.00 in view of the market conditions of labor in that particular vicinity.

(Mr. Roth objects as irrelevant, incompetent and immaterial. Objection sustained. Exception taken and allowed.)

Q What was the reasonable value of the work that O. M. Grant did for you in November 1920 on this placer ground?

A Between \$125.00 and \$150.00.

Q But it only cost you \$100.00?

A He worked hard and long hours.

Q Do you know how many days it took, of your own knowledge?

A He worked 12½ days.

Q You know that of your own knowledge? Were you there all the time?

A No, that is what I paid him for.

Q How much did you pay him a day?

A \$8.00.

Q Did he board himself?

A Yes sir.

Q Did Mr. O. M. Grant—did you have any arrangement with—O. M. Grant whereby Mr. O. M. Grant was to have any interest or benefits of any nature in the event he should strike a lode claim?

A None whatever.

Q At that time was there any one besides yourself that had any interest of any nature whatsoever in this placer claim besides yourself?

A No sir—no one up until the time suit was filed.

Q Well, did any one have any interest in that placer at the time suit was filed except yourself?

A No sir.

Q Does any one own an interest in the placer claim at this time?

A Yes, my attorney if I win the case.

Q Leave out your attorney—does any one own any interest?

A No sir.

Q All the interest your attorney has is a contingent interest, is it not?

A Yes sir.

Q And if you lose the case, your attorney wouldn't want it. Campbell and Tobin entered upon that ground about what time, as near as you can ascertain?

A Some time between the 25th and 30th of May.

Q What year?

A 1921.

Q Where were you at the time Campbell and Tobin entered upon that ground?

A Roosevelt.

Q Where is that—how far from this property?

A Thirty miles.

Q Is Roosevelt the place they call "The Landing"?

A Yes sir.

Q That is where boats land coming up the Kantishna River?

A Yes sir.

Q Did you at any time give Mr. Tobin any permission to enter upon your placer claim for any purpose?

A No sir.

Q Did you at any time give Mr. Campbell per-

mission to enter upon that claim for any purpose whatever?

A No sir.

Q When they entered upon the ground, whatever date it might be, did you know it at the time they entered?

A No. sir.

Q You say you were at Roosevelt at the time they did it?

A Yes sir.

Q A short time prior to that, was Mr. Campbell up at the Landing—up at Roosevelt at the time you were there?

A Yes sir.

Q You were there together, you and Campbell?

A Yes.

Q Did you have any horses there at the time?

A Yes.

Q State whether or not Campbell—you loaned some horses to Campbell.

A Yes, I loaned him a team to haul himself some logs.

Q Some logs?

A Yes, from Moose Creek to Friday Creek.

Q Where were your horses?

A At Roosevelt.

Q Horses were at Roosevelt?

A Yes sir.

Q And did he take the horses at Roosevelt—

A Yes sir.

Q —and go down in the vicinity of this property on Moose Creek—



A Yes sir.

Q —to haul the logs? Did he bring the horses back to you?

A Yes sir.

Q About how long did he have the horses?

A I believe it was twenty-one days.

Q Did you charge Campbell anything for the use of the horses?

A No sir.

Q He just borrowed them?

A Yes sir.

Q He and you were friends?

A Yes sir.

Q Up until that time had you had any difficulty with him or he with you?

A No.

Q How about Tobin?

A No trouble with him, no sir.

Q After Campbell brought the horses back to you at Roosevelt, what did Campbell then do? How long did Campbell stay there?

A A few hours.

Q Did he tell you where he was going?

A Yes.

Q Where did he say he was going?

A Back up.

Q Where was Campbell living at that time, if you know?

A I don't know.

Q Had you ever seen him around the vicinity of this placer claim of yours before that time?

A Yes, he lives 300 or 400 ft. below.

Q You mean at that time he lived there—in May or June of last year—did Campbell live there, if you know?

A Yes, he was living there in June—lived down here on Hamilton's bench.

Q On Hamilton's bench?

A Yes sir.

Q About how far from your lower side line?

A Between 300 and 400 ft. I should judge.

Q What was he living in—a house or tent?

A A tent.

Q Do you know who was living with him?

A Yes sir.

Q Who?

A Mr. Tobin.

Q They were living together?

A Yes.

Q That was before they entered on your ground?

A No, after. After I got back I saw them living there.

Q Before that, do you know where Campbell lived?

A No, I don't.

Q Do you know where Tobin lived?

A No, I don't.

Q Had you ever seen Campbell within the boundaries of your bench claim before Campbell and Tobin entered upon your ground for the purpose of making a discovery?

A I didn't see him, but there was a road went through there and Campbell was driving a team.

Q Driving a team? Who for?

A He was driving Aitken's team.

Q And where was Aitken working?

A He worked two miles on the hill above.

Q What was Campbell driving team for Aitken for?

A He hauled some meat, and hauled some wood.

Q Did Campbell have a contract to furnish wood to Aitken?

A Yes sir.

Q And in hauling, did the road pass over this placer claim of yours?

A Right through the center.

Q And Campbell had to go—had to travel up and down that road in order to get up the hill? That is true?

A Yes sir.

Q There was no other road within a reasonable distance?

A No sir.

Q Did Campbell ever work for Quigley that you know of before he located on your ground?

A I don't know.

Q Did Tobin?

A Yes, I seen Tobin working for Quigley.

Q Did you ever see Tobin within the boundaries of your placer claim?

A Only passing through.

Q Did he pass through the placer ground coming up to Quigley's house?

A Yes sir.

Q Did the road or trail lead that way?

A Yes sir.

Q After Mr. Campbell brought the horses back to Roosevelt and delivered them to you, you say he only stayed a few hours and came back down to this property and vicinity?

A Yes sir.

Q Did you have a talk with Mr. Campbell before he left?

A Yes sir.

Q Tell us as near as you can what date it was you had that talk with Campbell.

A As near as I can remember it was along between the 25th and 31st of May—it might have been earlier than that—between the 20th and 30th of May.

Q That was 1921?

A Yes.

Q That was Mr. Campbell here—the defendant?

A Yes sir. I invited him to stay all night, and he said no he was in a hurry to get back, so Mr. Walter Scott was living with me and got him a lunch.

Q Got Mr. Campbell a lunch to take with him on the road?

A Yes sir.

Q What did you say to Campbell with reference to your placer claim?

A I told him I would be up in a short time as soon as could get through to do some work on the ground.

Q On what ground?

A On the placer location.

Q What did he say?

A He didn't say anything.

Q Did you tell him what time you expected to get through with your work?

A No.

Q What were you doing at Roosevelt?

A Re-sacking ore and getting it ready for shipment.

Q You were working for Aitken?

A Yes sir.

Q Did Campbell see what you were doing?

A Yes sir.

Q He saw what you were doing?

A Yes.

Q You told him when you got through you were coming down there to do some work on your land?

A Yes sir.

Q State whether or not if at that time before you left Roosevelt that some one gave you some information in regard to Campbell and Tobin.

A Yes sir.

Q State whether or not you were informed that the defendants Campbell and Tobin had entered on your placer ground and made an attempt at locating a quartz claim.

A Yes sir.

Q When you received that information, what did you do?

A I couldn't do anything—I had to stay with the ore.

Q You had to finish sacking the ore?

A Yes.



Q What did you do with reference to your claim?

A I came on up to the claim.

Q As soon as you got through sacking ore? How many days after you received the information?

A It was some time after—the 25th of June.

Q When you got down to the placer claim?

A It was about that time.

Q Describe what conditions you found when you got down there.

A I found Mr. Campbell and Tobin working there.

Q Where were they working?

A Working on this shaft—this 12 ft. hole.

Q They were working at shaft indicated on the map as Campbell and Tobin shaft?

A Yes sir.

Q The same one you described as being hole No. 1 of O. M. Grant's?

A Yes sir.

Q What did you do, if anything, when you found them working there?

A I went up to Eureka and had Mr. Wilson type-write two notices.

Q Mr. Wilson was Commissioner and Recorder at Eureka?

A Yes sir.

Q How far is Eureka from this Mining Claim?

A Between 1½ and 2 miles.

Q Did you get some notices?

A Yes sir.

Q What was the nature of them?

A Trespass notices.

Q State in a general way what the contents were.

A I believe it said, "Notice is hereby given that I, Wm. Grant, am owner of this property, legal owner of this property. Trespassers will be prosecuted." Something to that effect.

Q What did you do with the two notices?

A I posted them.

Q Where?

A On the claim—posted one close to this shaft

Q Which shaft?

A This Campbell and Tobin shaft—and the other one off to one side.

Q How far?

A Twenty or twenty-five feet.

Q What did you post notices on? Were they on a board?

A Yes, I nailed them on boards.

Q And where was the board put?

A Nailed it on an upright.

Q And notice was nailed on the board?

A And driven in the ground.

Q About what time did you first put notices up?

A The day after I come up—can't tell the date.

Q Was it the latter part of June 1921?

A Yes.

Q Was Campbell and Tobin either one there at the time you put up notices?

A No sir.

Q Where were they?

A I believe they were down at Moose Creek

cutting logs.

Q What time of the day did you put them up first?

A Put them up in the evening.

Q State what happened to the notices, if you know.

A The next morning I was going back to Roosevelt with the mail—brought it up this trip—I was going back with the mail and three quarters of a mile from the claim on the road—was going along the road and came to a tree cut and laying across the road and notice put on it.

Q How big a tree was it?

A Oh, a cottonwood eight or ten inches through.

Q And one of the notices you had posted on your claim was posted on this tree?

A Yes sir.

Q Did you recognize that as being one of your notices?

A Yes sir.

Q Was there anything else on there?

A No sir.

Q I forgot to ask you to state whether or not you signed your name to the notices?

A Yes sir.

Q State whether or not it became necessary for you to get out and remove the tree in order to get along the road?

(Mr. Roth objects to question and objection is sustained.)

Q What became of the other notice?

A It was laying on the ground.

Q That next morning?

A Yes sir.

Q Were boards or sticks to which notices were fastened—were they in place?

A No sir, they had been taken away.

Q You have no knowledge who did it?

A No sir.

(Mr. Roth makes a motion to strike out testimony with reference to notices being down. Court denies motion.)

Q When you found this tree across the road, do I understand you were then on your way with the mail back to Roosevelt?

A Yes sir.

Q What did you do then?

A George Moody removed the tree and we went on to Roosevelt.

Q What else did you do regarding notices on this claim?

A I didn't do anything until I came back.

Q How long was that?

A Some time in July.

Q In July?

A Yes sir.

Q What, if anything, did you do in reference to the notices?

A I went up and built a tent to live in.

Q Up where?

A On the claim.

Q You built a tent?

A Yes sir.

Q Whereabouts did you put the tent?

A A few feet above the cabin.

Q Go ahead—you pitched your tent, and what else?

A Got ready to go to work and went out again—I still kept the notice and brought it back—put into a box this time—nailed it into a box and nailed the box on to a stake, a six inch stake—the stake stuck up above the box and knocked it down in the ground.

Q And was the notice in the box so that anybody could see it?

A Yes, it was a big box.

Q Did you nail it on the stake—the box containing the notice?

A Yes sir.

Q What happened, if anything? Tell the jury.

A I was out with a small axe driving it in—driving the stake in the ground—and I noticed a rock come past me. I looked up and another one come. I dodged it. The third came and struck me in the small of the back.

Q Who threw the rocks?

A Mr. Campbell.

Q Did you see him?

A Yes sir.

Q The two rocks thrown first that didn't hit you, did they come any where near you?

A They came close to my head—a little too high.

Q And the third rock that Campbell threw hit you in the back?



A Yes sir. I turned around to get away and it got me in the small of the back.

Q How big was it?

A About the size of your fist.

Q How far away was Campbell when he threw it?

A Twenty-five or thirty feet.

Q Which way was Campbell with reference to your tent—were you between the tent and Campbell?

A Between the tent and this hole, yes.

Q Where was Campbell?

A He was on the dump.

Q Was he on the dump near—you mean the dump surrounding the Campbell and Tobin hole?

A Yes.

Q What effect did it have on you when you were hit in the back with a rock as big as your fist? Did it paralyze you and knock you down?

A Yes sir.

Q Down flat on the ground?

A Yes sir.

Q What happened then?

A Roger came out—he was in the tent.

Q Roger Parenteau was then at your tent?

A Yes.

Q What did he do.

A He come up and asked me if I was hit. I told him I was.

Q You were still down?

A Yes sir.

Q What did Roger do, if anything?

A He took hold of my arm and helped me up.

Q Took hold of your arm and helped you up?

A Yes.

Q What did Campbell do in the meantime while Roger was helping you up?

A Campbell was coming towards us.

Q Did Campbell throw any more rocks after you got up?

A Yes, one or two more.

Q Did they come any wheres close to you?

A Yes sir.

Q Did they come any wheres close to Roger?

A Yes sir.

Q Do you know about the size of the rocks?

A I couldn't tell—they went past us.

Q What did you do then?

A Campbell came towards us and we went in the tent.

Q Did you hurry?

A Went as fast as we could.

Q Did Campbell come into the tent?

A No sir.

Q Did he come down towards the tent?

A No, I think he stopped.

Q But he ran after you until you ran in the tent?

A Yes sir.

(Mr. Roth makes objection and the Court orders answer stricken out.)

Q You said you went to the tent as fast as you could?

A Yes sir.

Q What did Campbell do, if anything?

A I didn't see what he did when we went into the tent.

Q You did say when Roger helped you up that Campbell was then coming towards you?

A Yes sir.

Q That you run to the tent as fast as you could?

A Yes sir.

Q Do you know how far—about, that Campbell followed you?

A No, my back was turned.

Q Was there any one else present besides you and Campbell and Roger Parenteau?

A Yes sir—not present, but there was a bunch in front of Quigley's house. I don't know who they were.

Q About how far would it be from Quigley's house down to where you were?

A Close to 300 ft.

Q Did Campbell say anything during this trouble?

A I didn't hear him say anything.

Q You didn't hear him say anything?

A No.

Q Did you say anything to Campbell?

A I never spoke to him since he left the Landing.

Q Did Roger Parenteau say anything to Campbell that you know about?

A Yes sir, I heard him say something, but didn't know what it was.

Q After Campbell knocked you down?

A Just when I was getting up, yes.

Q Where was Tobin?

A He was in the hole.

Q In the Campbell and Tobin hole?

A Yes.

Q Do you know where Campbell went after he went back, when he started after you, where did he go after that?

A When I came out of the tent he was going towards the dump.

Q Campbell and Tobin shaft?

A Yes. I went down towards Moose Creek and up to Eureka.

Q You saw him?

A Yes sir.

Q You come out of the tent and went down to Eureka?

A Yes sir.

Q Did you and Campbell have any more trouble after that—I mean any fights or difficulties?

A No sir.

Q Did you see when Tobin come out of the hole?

A No sir.

Q You had left and gone down to Eureka without seeing Tobin come out of the hole?

A Yes sir.

Q Did Campbell and Tobin have a windlass across that hole at that time?

A Yes sir.

Q Can you tell about what date this was?

A The 25th day of July.

Q 1921?

A In the morning, yes sir.

Q You may state whether or not you swore out a warrant for Mr. Campbell's arrest that day.

(Mr. Roth makes objection as irrelevant, incompetent and immaterial. Objection sustained. Exception taken and allowed.)

Q You may state whether or not you at that time or any time prior to that day examined the ore or rock or the material that Campbell and Tobin had taken from their hole or discovery shaft.

A Yes sir.

Q State what the character of the substance was—what it looked like.

A There was some galena there—some of it looked as if it might carry gold without galena—some galena—quite a bit of ledge matter.

Q Did you have any of it assayed?

A Yes sir.

Q Have you the returns of the assay?

A No sir.

Q However, you got returns from it?

A Yes sir.

Q You may state independently of those returns, as a quartz miner, what further observations you made of the material that came out of the hole—what the material that came out of the hole looked like.

A It looked like ledge.



Q Ledge matter?

A Yes sir.

Q Could you tell whether or not it come from a ledge or whether or not it might be float?

A It wasn't float—there was no float there. It was shot out of a ledge.

Q Then as a mining man, state whether or not the rock that Campbell and Tobin took out of that hole was or was not what is known as rock in place.

MR. ROTH: We admit that the rock that Campbell and Tobin took from the bottom of the hole at the depth of about 40 ft. was ore which came from a ledge in place and carried value sufficient upon which to base a discovery of a lode—sufficient to warrant a person to proceed to work it.

BY MR. STEVENS: (To Mr. Grant)

Q After seeing and determining that this rock was ore or vein matter or ledge matter in place, what, if anything did you do in the way making any location upon that ledge?

A I located a quartz claim.

Q And state whether or not you put up any discovery stake.

A Yes sir.

Q About where?

A Near the hole.

Q Near the hole of Campbell and Tobin?

A Yes.

Q And state whether or not you at that time posted—put up any notice of location—notice of discovery?

A Yes sir.

Q Did you write that on the stake—the discovery stake—or did you put it up in the way of a notice on paper?

A I wrote it on the post.

Q Tell the jury what you wrote on the post at that time.

A I haven't the location certificate with me—I can't remember what all I put on it.

Q Was the notice on the location stake the same as your location certificate?

A Yes sir.

Q To refresh your memory then—(Interrupted)

A I chained 1500 ft. down hill in a westerly direction.

Q Examine that please (hands him paper) and state whether or not that is your signature.

A Yes sir, that is my signature.

Q State what that paper is that I hand you. Is that your location certificate?

A Yes sir.

Q Did you have that recorded?

A Yes sir.

Q Since you have read that, can you state now what it was you put on your discovery stake?

A Yes sir.

Q Just state what you put on the discovery stake.

A (Reads) "That the undersigned a citizen of the United States, having discovered at the place where this notice is posted on this the 25th day of July 1921, a vein or lode of quartz or other rock in

place bearing gold and other valuable mineral deposits does hereby locate and claim the same as the notice on initial post Lode Mining Claim. The general course of the vein or lode as far as the same can now be ascertained is westerly and the undersigned hereby locates and claims the same 1500 feet in length and 50 feet in width in a westerly direction from the point of discovery, where this notice is posted, "and a total width of 50 feet, the same being 25 feet on each side of the center of said vein. Notice dated and posted this 25th day of July 1921. This claim is known as the Hillside Quartz Claim. Wm. Grant, Locator." I didn't write it and it is hard to read.

Q You wrote the signature?

A Yes sir.

Q That is made out on regular form of blank?

A Yes sir.

Q Please give the date.

A 25th day of July.

Q 1921?

A Yes sir.

Q After posting that notice, or copy of that notice on the discovery stake as you have indicated, what else did you do with reference to perfecting your location?

A I put two corner posts there 25 ft. on each side of the center post.

Q You mean the center post, or discovery post?

A The center post and discovery are different—the discovery post is a few feet above the hole, and other one is—(Interrupted)

Q Your discovery post was near Campbell and Tobin's hole and there is where you put your notice? Is that right?

A Yes sir.

Q And north or northeasterly of that you put another post which would be the center end post. Is that it?

A Yes, I put three posts there—the center post and two corners, right below Quigley's line, and corners each side of it.

Q You put three posts up at your upper end line besides your discovery post?

A Yes sir.

Q You spoke about one post being the center end post. How far on either side did you put your corner posts—how far from the center post?

A 25 ft.

Q That would mean your claim was 50 ft. wide?

A Yes sir.

Q Did you measure them or calculate the distance down hill?

A I stepped it.

Q How far down hill did you go?

A 1450 ft. as near as I could by stepping, I figured I was going down hill and taking long steps.

Q You claimed 1500 ft.?

A Yes.

Q You went down hill, and then what did you do?

A Put in a center stake.

Q Did you write anything on the center stake?

A Yes sir.

Q What did you write?

A Practically the same as on here (indicating notice of location)

Q You mean the same as in the location notice on the discovery stake?

A Yes sir.

Q Did you put your own name there as locator?

A Yes sir.

Q Date of location?

A Yes sir.

Q Name of location

A Yes sir.

Q What name?

A The Hillside Lode Claim.

Q From the center stake at the lower end, did you put any other stakes?

A Yes, two corners.

Q How far did you put the corner posts from the center?

A 25 ft. each side.

Q Did you put anything on the corner posts?

A Yes sir.

Q What did you put on the corner posts?

A I put on "northeast" and "southwest".

Q Talking about these lower end line stakes. What, if anything, did you put on the southwesterly corner stake?

A I put "southwesterly corner of the Hillside Lode Claim, staked July 25, 1921, Wm. Grant, Locator."

Q Is that all you put on?



A I believe so.

Q Did you put any arrows on?

A Yes sir.

Q Tell about the arrows—which way did they point?

A They were pointing up hill towards the upper end line.

Q But there was just one arrow pointing up hill, wasn't there?

A Yes, the other was looking towards the corner.

Q Towards the other lower corner?

A Yes.

Q Tell the jury, what, if anything, you put on the southeasterly corner of that claim.

A The same as I put on the other, only southeast.

Q Southeast instead of southwest?

A Yes.

Q Otherwise it was the same?

A Yes.

Q What kind of posts were those two corner posts? Describe them. How big, how tall—what were they?

A They were all over three feet high.

Q About how thick?

A They averaged from three inches up to five inches. The center stake is a big stake.

Q Were any of them less than three inches in diameter?

A No sir.

Q Did you put anything on the center—the lower center stake?

A Yes sir, I put on "Lower center stake of the Hillside Lode Claim, staked July 25, 1921, claiming 1500 ft. in an easterly direction to upper center post" and my name.

Q As I understand it, that would be north easterly?

A Yes, northeasterly.

Q Is that all you put on?

A I think so.

Q From those lower corner stakes could you look up and see the upper end stakes of your claim?

A Yes sir.

Q Did you see them?

A Yes sir.

Q From both of those stakes down below?

A Yes sir.

Q Going back to the upper end stakes. You stated what you put on the discovery shaft—I mean the discovery stake near the shaft of Campbell and Tobin. What, if anything, did you put on the upper center stake?

A I put on a good lot—practically what is on there (indicating notice of location)

Q What is on there you put on discovery shaft?

A That was on the discovery stake—just said discovery stake, date of discovery, and date of location. That was on the center stake that there.

Q What, if anything, did you put on the discovery stake?

A Gold discovered—a ledge discovered in place—something to that effect, 25th day of July 1921.

Q Did you put your name?

A My name and date, yes.

Q Name of the claim?

A Yes.

Q A few feet northeast, up towards Quigley's claim. you put in a center, which would be the upper center end stake. You put on a copy of this description, the same as the certificate of location?

A Yes.

Q You have already described the other two stakes, the corner stakes in the upper corners. What, if anything, did you write on those stakes?

A Date of location, name of claim, the corners, and name as locator.

Q How did you designate the corners—the one which would be the northwesterly corner, what did you call it?

A Called it the northwesterly corner.

Q You wrote it on the stake?

A Yes.

Q The northeasterly corner, what did you put on it?

A Northeasterly corner.

Q What were the sizes of those two upper corner stakes—about?

A Four feet high and five or six inches square.

Q Were they squared?

A Yes.

Q All six stakes were squared?

A Yes sir.

Q From the discovery hole there or stake, when you came down hill approximately 1500 feet, what direction did you go? I mean with reference to the Quigley location had it extended in a straight line. How did you come down?

A I come down in a southwesterly direction.

Q Did your lines so far as you were able to do so did your lines run the same as if a continuance of the strike of the lode as Quigley had located it?

A Yes sir.

Q Would they run in line—extended the same as if you sited from Quigley's discovery down to Campbell and Tobin's discovery—a straight line extended from that—about?

A Yes.

Q When you came down hill to go 1500 ft. or thereabouts, did you go further south or southwest than Campbell and Tobin's location, or attempted location, or did you see their lines?

A I didn't see the line.

Q At the lower end?

A I didn't see the corner post at the lower end—one of the corner posts was out in the brush.

Q That is in the lower corner?

A In the lower corner.

Q As I understand you based your discovery of that lode—you based your location of that lode on the discovery which was made by Campbell and Tobin?

A Yes, on a 'known lode.'

Q You regarded it as a known lode after Campbell and Tobin had opened it up?

A Yes.

Q Prior to that time it was not known?

A Yes. No, not a known lode before.

Q As a mining man, state whether or not you know at this time—can you state at this time whether the Campbell and Tobin discovery is the same lode that Quigley located or not?

A No sir, I can not.

Q You don't know?

A No sir.

Q Could anybody tell?

(Mr. Roth makes objection on the ground that it is impossible for him to state whether anybody can tell. Court rules witness can state whether he could tell and that is as far as he can go.)

Q Mr. Grant, is there any means by which a mining man, familiar with veins and lodes and quartz mining, is there any means by which a miner can tell how far down under the surface a vein will go, without exploring it?

A Not without digging, no.

Q Is there any means of determining how far a ledge will run without exploring or digging or prospecting?

A No sir.

Q Is there any presumption indulged in by mining men that a ledge extends at all any distance?

A Not if you don't see it, no.

Q It might be a good chance, that is all?

(Mr. Roth objects to counsel testifying)



Q You have identified this as being the original location certificate?

A Yes sir.

(Mr. Stevens offers location certificate in evidence same being admitted and marked Plaintiff's Exhibit "C")

MR. STEVENS reads Plaintiff's Exhibit "C" to the jury, as follows:

"Notice of Location. Notice is hereby given that the undersigned, a citizen of the United States, having discovered at the place where this notice is posted on this 25th day of July 1921, a vein or lode of quartz or other rock in place bearing gold and other valuable mineral deposits, does hereby locate and claim the same as the notice on initial post Lole Mining Claim. The general course of the vein or lode as far as the same can now be ascertained is westerly and the undersigned hereby locates and claims the same 1500 feet in an length and 50 feet in width in a westerly direction from the point of discovery, where this notice is posted, and a total width of 50 feet, the same being 25 feet on each side of the center of said vein. Notice dated and posted this 25th day of July 1921. This claim is known as the Hillside Quartz Claim. Wm. Grant, Locator."

Endorsement:

"No. 3154. Notice of Location. Filed for record at request of Wm. Grant on the 26th day of July, 1921, at 10 minutes past 9 P. M.

and recorded in Vol. 1 of General, page 211,  
Kantishna Recording Precinct.

(SEAL)

C. Herbert Wilson  
Recorder.

Session 10:00 A. M. February 3rd, 1922.

WILLIAM GRANT, called as a witness on his  
own behalf, heretofore duly sworn testified:

**Direct Examination (Continued)**

BY MR. STEVENS:

Q Mr. Grant, in describing the boundaries of  
your quartz claim, concerning which you testified  
yesterday, state how the end lines of your claim  
were marked out.

A They were marked out parallel.

Q The end lines of your quartz claim were  
marked parallel to each other?

A Yes sir.

Q State whether or not they run substantially  
at right angles with the side lines.

A Yes sir.

Q Before you located the quartz claim, did you  
see the boundary lines or location notice posted by  
Campbell and Tobin?

A Yes sir.

Q State whether or not your quartz claim so  
far as the side lines are concerned lies substantially  
within the boundaries of the Campbell and Tobin  
quartz claim location.

A They do.

Q Is the upper end line of your quartz claim in  
the same vicinity or near the upper end of Camp-  
bell and Tobin's quartz claim?

A Yes.

Q You said you didn't examine the stakes at the lower end of Campbell's claim?

A No, I didn't.

Q Did you know at the time you located that the quartz claim of Campbell and Tobin runs, or claims to have run, some 1470 feet down hill and in a westerly or southwesterly direction?

A Yes sir.

Q That is the same direction as you describe your claim?

A Yes sir.

Q State whether or not at the time you located the quartz claim—your quartz claim—covering in part the quartz claim located by Campbell and Tobin, state whether or not that was done by you under advice of your attorney.

(Mr. Roth objects account irrelevant, incompetent and immaterial. Objection sustained. Exception taken and allowed.)

Q State, if you know, how far it is from the location of this ground in dispute in the Kantishna country to any place where there is a law office.

(Mr. Roth objects on the same ground and objection is sustained. Exception taken and allowed.)

Q Did I understand from your testimony yesterday that you stated you based your quartz location upon the discovery made by Campbell and Tobin?

A Yes sir.

Q Why did you do that?

(Mr. Roth objects as irrelevant, incompetent and immaterial. Objection sustained. Exception taken and allowed.)

Q Were you in the vicinity of this property at the time Mr. Quigley made a discovery up the hill above your placer claim?

A Yes sir.

Q State about how far the discovery of Quigley's is above your placer claim, if you know.

(Mr. Roth objects on ground that figures have already been given in testimony. Objection sustained.)

Q Did you know about that time Mr. Quigley made a quartz location and based it upon that discovery?

A Yes, he told me so.

Q Do you know the time or occasion of Mr. Quigley's starting his tunnel?

A No, but pretty near—I wasn't down there when he started.

Q Did you and Quigley have any conversation in regard to where the mouth of Quigley's tunnel was located?

A Yes.

Q What was it?

MR. ROTH: When was this?

MR. STEVENS: The first conversation.

MR. ROTH: The time should be fixed as nearly as we can.

MR. STEVENS: It was after the discovery.

(To Mr. Grant) Do you know when Mr. Quigley did start the mouth of his tunnel—the date?



A No, I don't.

Q What conversation did you have, if any about the location of the mouth of the tunnel?

A Mr. Quigley asked me if I would allow him to dump on the placer ground when he developed the tunnel.

Q Was that after he started the tunnel?

A About the time he started.

Q What did you tell him?

A I told him yes, it couldn't hurt any—he had to run the tunnel and dump some place—it would be allright.

Q He dumped the material he dug out of the tunnel near the mouth?

A Yes sir.

Q Did he say, or you say, as to whether or not the mouth of the tunnel was on your placer ground?

A Not at that time.

Q Was that all that was said at that time?

A Yes sir.

Q Was there any conversation any other time about the location of the mouth of the tunnel?

A Yes.

Q About when and what was said?

A Along the last of September before I came out, I measured—I sited the lower line from corner to corner and made—and measured from there up to Quigley's tunnel.

Q You sited and located the straight line between post No. 1 and post No. 2, and then mea-



sured straight up from that line to the mouth of the tunnel?

A Yes sir.

Q What did you ascertain as regards the location of the mouth of the tunnel?

A I ascertained that the tunnel was outside of the quartz location—outside of the placer location.

Q Did you have any talk with Quigley about it?

A Yes, Mr. Quigley was there. I said, "tunnel is not on the placer," and he says, "No it is off your ground," and he asked me to go in and see the tunnel.

Q How far did you go in?

A To the face of it.

Q About how long was the tunnel?

A 200 ft. at that time.

Q Could you see an exposure of ledge there?

A Yes, in places.

Q How far in from the mouth of the tunnel before you could see any exposure of ledge?

A The last time I was in, the tunnel had been timbered then, but before that I was in several times and it seemed to be 30 ft. to 35 ft. before it showed.

Q At that time was the tunnel timbered?

A No sir.

Q But that was, all of that was within the boundaries of Quigley's quartz location, as heretofore located?

A Yes sir.

Q The defendants in this case, as you have

testified, were in possession of that hole and working it?

A Yes sir.

Q Did they ever give up possession to you?

A No sir.

Q Were they holding possession against you at the time you brought suit?

A Yes sir.

Q Were you damaged by reason of their wrongfully holding possession?

A Yes sir.

Q How much?

A Over \$500.00.

Q \$500.00 is what you ask for as damages in this suit?

A Yes sir.

MR. STEVENS: Take the witness.

### **Cross Examination**

BY MR. ROTH:

Q I understood you to say you were a miner of about forty years experience?

A Yes sir.

Q You say you were born in Scotland?

A Yes sir.

Q When did you leave Scotland?

A In '82.

Q And where did you go?

A Come to New York.

Q Have you remained in the United States, excepting the two years in Dawson?

A No, I was nine months out when I made a trip back in 1915.

Q When did you first go to a mining state?

A In '83.

Q In '83. What state?

A Colorado.

Q How old were you then?

A When I went to Colorado? About twenty.

Q About twenty. What year were you born?

A In '60.

Q That would make you twenty-three wouldn't it?

A It might—I never figured it out.

Q That would knock at least three years off your experience as a miner. I understood you say you were sixty years old?

A No sir.

Q No? It was a mistake?

A Sixty-two years old.

Q Where did you go in Colorado—what part of the state?

A Linwood Springs.

Q What part of the state is it?

A In the western part.

Q In a mining section?

A Yes sir.

Q How long did you remain in Colorado?

A Twelve or fourteen years.

Q Did you locate any mining claims there?

A No sir.

Q Did you own any mining property in Colorado?

A No sir.

Q What did you do besides working around mines?

A That's all I did—worked around mines.

Q What kind of mines?

A Quartz mines.

Q As a laboring man?

A Yes sir.

Q You had no experience with the law in Colorado?

A None whatever.

Q Where did you first make a mining location yourself?

A In the Kootenais.

Q Where was that?

A In British Columbia.

Q When was that?

A In 1905 and 1906.

Q Then you were in British Columbia in 1905 or 1906.

A Yes sir.

Q How long were you in British Columbia?

A Two years.

Q What kind of mining claims did you acquire there?

A Quartz.

Q Did you locate them yourself or purchase them?

A Located them.

Q How many?

A Two.

Q Did you work them?

A No sir.

Q Where did you next acquire mining property?

A In Dawson.

Q When was that?

A 1901.

Q Did you acquire it by purchase or location?

A By location.

Q How many claims?

A One.

Q What kind were they?

A Placer.

Q Where did you next acquire mining claims?

A In Fairbanks.

Q You mean in the Fairbanks district?

A Yes sir.

Q And where?

A Solo Creek.

Q How many?

A One.

Q Where else? Is the one claim all you ever acquired on Solo?

A Yes sir.

Q By location?

A Yes.

Q Where next?

A In Totatlaneka.

Q What kind?

A Placer.

Q How many?

A I don't remember about how many—must have had six or seven.

Q You located them?



A Some were located for me.

Q But you located some yourself?

A Yes, I did.

Q Did you acquire any quartz claims there?

A No sir.

Q Where next did you acquire mining claims?

A As near as I can remember, Kantishna was next.

Q When was that—what year?

A 1919.

Q Didn't you acquire other claims here?

A I might—but I don't remember.

Q You don't remember any other claims around Fairbanks recording district?

(Mr. Stevens objects as not proper cross-examination, but Court rules it may be admitted.)

Q What did you do with your claim on Solo Creek?

A Let it go back.

Q Did you do any work on it?

A I did the first assessment.

Q What did you do with the claims on Totatlanika?

A They all went back.

Q What work did you do?

A Prospected a couple of years.

Q And let them go back?

A Yes sir.

Q What experience have you had in lode mining, except the experience that you had as a laboring man working on a lode claim?

A The experience I have had? Have been

working off and on in quartz mines for the last forty years.

Q I am talking about quartz mines distinctly. Did you—that is before you went to the Kantishna—did you ever run a quartz mine?

A No sir.

Q Did you ever do anything around a quartz mine except common labor?

A I was a miner.

Q I mean as a common miner or timberman?

A Yes sir.

Q Did you ever run a power drill?

A Yes sir.

Q What kind?

A Ingersoll-Rand.

Q Where?

A In Aspin, Colorado.

Q The only experience you had as a quartz miner, aside from your experience in the Kantishna, was experience you had in quartz mines as a laborer in the state of Colorado?

A And British Columbia, yes.

Q Then you did have experience in British Columbia?

A Yes sir.

Q Where?

A In Noble 5, Eureka Mines.

Q What were you doing there?

A Mining. Was pounding a drill most of the time.

Q By hand?

A Yes.

Q How long was that?

A For two years.

Q When you went into the Kantishna, from where did you go this last time that you went into the Kantishna—I believe you said you went into the Kantishna in 1905 or 1906?

A No sir.

Q Where did you go from when you went to the Kantishna the first time?

A From Fairbanks.

Q When was that?

A In May 1919—left here the 27th day of May 1919.

Q Did you go as an employee?

A I did, yes.

Q Of whom?

A Mr. Aitken.

Q How long did you remain in Mr. Aitken's employ?

A Up until the last day of June 1921.

Q Have you not been in his employ since?

A No sir.

Q Do you represent him?

A No sir.

Q Your relations with him have ceased?

A Yes sir.

Q The last day of June 1921?

A That is the last day, yes sir.

Q That was after these defendants had located their quartz claim in the Kantishna—the one in controversy?

(Mr. Stevens objects to question as a fact

not appearing in the evidence. Mr. Roth agrees to let it go.)

Q When you located this quartz claim there you called it the Hillside Lode Claim?

A Yes sir.

Q And I believe you stated you made that claim 50 ft. in width?

A Yes sir.

Q How does that come?

A That is all I was allowed through a placer mining claim.

Q Then you know—you understand that if that placer claim is valid, that quartz claim can only be 50 ft. wide?

A That is the way I understood it, yes sir.

Q And you know if the quartz claim holds that the placer—that is if the placer claim and the quartz claim are valid, that the placer claim will stand except for a strip 50 ft. wide? If the placer claim is a valid location, and the quartz is valid too, then the placer claim will stand as a valid placer claim to all the area except a strip 50 ft. wide and the quartz claim will stand as a good quartz claim 50 ft., and the placer for all the balance. You understand that, don't you?

A I understand, with the exception of what Quigley took off.

Q I am talking about just simply the claim of defendants. If the defendants' claim stands as a valid quartz claim and the placer stands as a valid placer, as you understand it, your placer will stand, as far as the defendants are concerned, in its en-

tirety, except a strip 50 ft. wide?

(Mr. Stevens objects to cross-examination on the law. Objection over-ruled. Exception taken and allowed.)

Q What did you write on the northwesterly corner post of the quartz claim that you located there? Did you put it down in a book at the time you wrote it?

A Yes sir.

Q Did you put down in a book what you wrote on the placer at the time you wrote it?

A Yes, it is here—but not the placer is here—simply a memorandum when stakes were placed, etc.—not what was on the stakes—just a memorandum.

Q I was talking about what was written on the stakes.

A Not that—simply a memorandum.

Q What did you write on the northwesterly corner stake of that lode claim that you attempted to locate?

A I wrote "Northwesterly corner stake of the Hillside Quartz Mining Claim, located July 25, 1921, Wm. Grant, Locator"—on all posts.

Q That is all you wrote?

A I think it is all—I wouldn't be sure.

Q Have you written it in a book?

A No, not that.

MR. STEVENS: You didn't write "northwest corner" on all posts?

A No, just on the northwest.

BY MR. ROTH:



Q Was there anything else you wrote?

A That is all I remember.

Q Would you remember if there was anything else?

A I think I would.

Q You think that is exactly what you did write?

A Yes sir.

Q What did you write on the northeasterly corner stake of that attempted quartz location?

A The same, with the exception of northeast.

Q What did you write on the southwesterly corner stake of that lode location attempted to be made?

A Same as the balance, except southwest.

Q What did you write on the southeast corner stake of your attempted lode location?

A The same except southeast.

Q The same, except southeast?

A Yes sir.

Q You say that when you did the assessment work on that placer claim, or when you were about to have it done, you went on to the ground with O. M. Grant and pointed out to him the place to do the work. Is that correct?

A Yes sir.

Q Where did you first go with him and show him where to work? Did I understand you to say that it was at the exact point where Campbell and Tobin, the defendants in this case, made a discovery?

A Yes sir.

Q How did you say you picked out that spot?

A I told him to sink here for the assessment on the placer and if the lead didn't come through he might find some float.

Q That is what you told Mr. Grant?

A Yes sir.

Q Did you tell him how deep to sink?

A No sir.

Q Where else did you tell him to sink?

A I didn't tell him no place else to sink.

Q That is the only instruction you gave him—to sink in that one place?

A Yes sir.

Q And that you would have a couple of chances?

A Yes sir.

Q A chance to find the lode and—(Interrupted)

A And represent the claim at the same time.

Q When did you next go down to that placer claim?

A A few days later.

Q About how many days later?

A In about two days I went down.

Q Where was Mr. O. M. Grant working at that time?

A There on that hole.

Q The same hole?

A Yes sir.

Q He worked in that hole two days to your knowledge?

A Yes sir.

Q How deep was he in the hole at that time?

A I looked down there—didn't measure—and as near as I can remember, it was eight feet or over.

Q Was he two days going eight feet, or had he sunk some where else in that time?

A I don't know—that was the depth of the hole

Q Was there any one else there?

A Yes sir.

Q Who?

A Dan Sutherland and Trundy.

Q Did you give any directions as to the work at that time?

A No sir, he wasn't there.

Q What time of day were you there?

A In the evening.

Q What time?

A About five o'clock.

Q Do you know where O. M. Grant was?

A Yes sir.

Q Where was he?

A Going up towards his home on Eureka Creek.

Q He had quit his day's work?

A Yes sir.

Q Did you go down into that shaft at that time?

A No sir.

Q Did you examine the dump to see what kind of stuff came out of the hole?

A Yes, we looked at it.

Q What did you find?

A Broken-up schist, rock, gravel—and little of everything.

Q Did you find any float?

A No sir.

Q When did you next go back to that particular hole?

A I don't think I was at the hole again before I measured it and he had finished the assessment.

Q You went back and measured the holes?

A After he had done the assessment.

Q Did you put down the measurements in a book?

A On a piece of paper.

Q Who swore to the assessment work?

A O. M. Grant.

Q Have you that original certificate?

A Yes sir.

Q May I see it?

A Mr. Stevens has it.

(Mr. Stevens hands the paper to Mr. Roth who examines it and then hands to Mr. Grant)

Q Is that the original? Is that Mr. Grant's signature?

A Yes sir.

(Mr. Roth offers certificate in evidence as part of the cross-examination of this witness. Same is admitted and marked Defendants' Exhibit "1")

MR. ROTH reads Defendants' Exhibit "1" to the jury, as follows:

"Affidavit of Annual Labor. United States of America, Territory of Alaska, Kantishna Precinct. I, O. M. Grant, being first duly

sworn on oath depose and say: That during the year ending December 31st, 1920 and between the third day of November and the sixteen day of November thereof, 12½ days labor were performed upon and for the benefit and development of the placer mining claim known as the Hill Bench Right Limit of Moose Creek and adjoining Friday Creek in the Kantishna Mining and Recording District of Alaska. The improvements were made at the instance of Wm. Grant and consist of sinking nine holes that will average eight feet in depth, the work being done within 300 feet of the Initial Post and are of the reasonable value of \$100.00. That I have actual knowledge of the facts set forth in this affidavit. O. M. Grant.

Subscribed and sworn to before me this 15 day of Feb. 1921."

Notary (blank) (Seal)

(Mr. Roth stipulates he will not make a point of the fact that signature of notary is missing)

Endorsement:

"No. 3068. District of Alaska. Fourth Judicial Division. ss. Filed for record at request of T. P. Aitken on the 15 day of Feb. 1921 at 30 min. past 6 P. M. and recorded in Vol. 1 General, page 166. Kantishna Recording District.

(SEAL)

C. Herbert Wilson.

Recorder

Hill Bench"



BY MR. ROTH:

Q How did you say you lined up for that first hole you directed Mr. Grant to sink there—just what did you do in order to line it up?

A I looked up along to Quigley's discovery and lined the mouth of his tunnel—lined straight down and measured from Mr. Quigley's center post down 25 ft.

Q You stated you saw some ore or ledge matter that came out of this Campbell and Tobin discovery shaft that was not float upon which you based your discovery?

A No sir, I never said that.

Q What did you say?

A I said I found that on the dump but I never said I based my discovery on it.

Q What did you base it on?

A What was at the bottom of the hole.

Q You saw what came out of the hole.

A I saw it in the hole.

Q You went in the hole?

A Yes sir.

Q When did you go down in the hole?

A The latter part of September—I don't remember the date.

Q Where was Mr. Campbell and where was Mr. Tobin at that time?

A I didn't see them.

Q Do you know where they were?

A No sir.

Q They were not there?

A No sir.

Q You didn't go down until the latter part of September?

A No sir.

Q I understand you located your claim before that, didn't you?

A Yes sir.

Q Didn't you claim a discovery before you went into the hole in September?

A Yes sir.

Q What did you base that discovery on?

A I based it on what I found on the dump and also on a known lead.

Q How did you know it was a known lead?

A I knew it was a known lead by all reports.

Q By all reports?

A Yes.

Q It was commonly known?

A Yes sir.

Q It was commonly known to be a quartz lode and also it showed on the Dump? You knew it for some time?

A Yes, for some time.

Q When did you first yourself learn that there was a known lead there?

A In July—the latter part of July.

MR STEVENS: What year?

A 1921.

Mr. Roth objects and desires to be permitted to question the witness without counsel interrupting. Court agrees that it is his privilege.)

BY MR. ROTH:

Q You staked down how many feet from that

hole when you located your quartz claim—from the hole, down how much did you stake?

A 1500 ft.

Q From Quigley's line you staked down 1500 ft.?

A Yes sir.

Q From Quigley's line to your quartz line was how far?

A I didn't say.

Q How far was it?

A What do you mean?

Q From Quigley's lower end line of the Red Top down to your lower line of the placer claim—the way you staked it?

A Fourteen hundred and some odd feet.

Q From Quigley's line down to the end of your placer?

A I never measured it.

Q How far would you estimate the distance to be?

(Mr. Stevens objects on account of map being drawn to scale. Court rules that witness can state if he knows.)

A I don't know.

Q Can't you give me any idea?

A Can make a rough guess.

(Mr. Stevens objects to a rough guess, but Court over-rules.)

A I would guess somewhere between 400 ft. and 500 ft. probably more or less—I can't tell.

Q Now, the claim you say at that time—at the time you staked your placer claim—adjoining

yours was the placer claim of John Hamilton—a well known placer claim?

A Yes sir.

Q You stake over it?

A Not over it—alongside of it.

Q No, with your quartz claim?

A Yes I was over it.

Q You staked down over it?

A Yes sir.

Q Did you at that time consider that it was a valid placer claim?

A No sir.

(Mr. Stevens makes objection and same is sustained.)

Q Did you stake down over more than one placer claim with your quartz claim?

I staked over the Hillside Placer Claim also the Horse Shoe.

Q Wasn't there another one?

A No sir.

Q Are you sure?

A I don't think so.

Q When you staked your quartz claim down on the Horseshoe Placer Claim, was there a well known lode on the Horseshoe Placer Claim at that time?

A No sir.

Q Did you put a number on the corner post of your quartz claim?

A Which corner post?

Q Any of them?

A Yes sir.

Q On the quartz claim?

A Yes sir.

Q What did you put on them?

A No. 1, 2, 3 and 4.

Q You are sure you did that?

A Yes sir.

Q When you came to staking your placer claim, did you put a stake of your own at your initial corner?

A No sir.

Q What was it you wrote on the initial corner post?

A What I recorded, with the exception of the date.

Q I am talking about the placer claim.

A I am talking about the placer, too.

Q You put on that corner post just what was on the notice of location?

A With the exception of the date.

Q And you copied—in order to make that notice of location, you copied off of your original notice of location stake?

A Yes sir.

Q And you copied off there and took it and had it recorded?

A Not right away.

Q But the same one?

A Yes sir.

Q You put everything there on the stake in that notice?

A I think I did.

Q You copied it and that was your purpose?



A. Yes sir.

Q What did you have on the second post—on the southeastery corner post of your placer claim—what did you have written on that post?

A No. 2 Post on top—Bench Claim—Hillside. Placer Claim. Do you want the date, month and year?

Q Everything.

A "April 19, 1920, claiming 1320 ft. to post No. 1, 660 ft. to post No. 3."

Q Anything else?

A "Staked for placer mining purposes. Wm. Grant, Locator" I am not sure whether I had John Hamilton as a witness or not.

Q That is all on that stake?

A That is all I remember.

Q Did you copy off that too when you made your certificate which you afterwards filed?

A No sir.

Q Now when you went there the next day as you say—which would be on the 20th day of April 1920—

A Yes sir.

Q —you set the corner post that is now above Quigley's cabin?

A Yes sir.

Q Was any one with you when you set that stake?

A No sir.

Q You came from where when you set that stake?

A From down hill—from the mine.

Q From whose mine?

A Aitken's mine.

Q What time of day was that?

A In the forenoon.

Q And where did you get the stake?

A I had the stakes—had a team leave the stakes—all the stakes.

Q Who was the teamster?

A One of Bartlett's teamsters who was hauling wood.

Q Where did he leave them?

A He left them down near the lower line—all of them.

Q Near the initial stake?

A Yes, but over to the center of the claim where the road came up through.

Q How many stakes did he leave?

A Four.

Q What did you do with them?

A Took two to the upper corners and the other two were for the lower corners.

Q What did you do with them?

A I left them—didn't use them.

Q You never put them up?

A Not then.

Q You never put two up on the lower side line of your claim?

A No sir.

Q What did you write on that stake which stands above Quigley's cabin—where Quigley's cabin now stands—what did you write on the stake at the time you set it there?

A "Corner post No. 4 of the Hillside Placer Mining Claim located July 19, 1920, Wm. Grant Locator"—and arrows, (I had arrows on all of them, I forgot to mention), pointing down to discovery post, also pointing up to post No. 3, as near as I can remember.

Q And the same day I understood you to say you set your northeasterly corner stake of that placer claim?

A Yes sir.

Q How did you get along the hill between the northwesterly corner and the northeasterly corner?

A It wasn't bad, the snow had melted off and you could walk along the hillside when there was no snow.

Q Wasn't there any snow?

A No, not on the hillside—there was some snow in the draws, but patches where it had melted off.

Q When you went down there to set that northwesterly corner stake, what was the first thing you did when you got there with reference to setting the stake—what is the first thing you did?

A The northwesterly?

Q The northwesterly and the northeasterly.

(Mr. Stevens objects on account of there being two questions in one. Objection over-ruled.)

A No you mean post No. 3?

Q You know what the northwesterly stake of your placer claim is, don't you?

A Post No. 4.

Q I said the northwest and the northeast.

A I set them in the same day—went there for

the purpose of setting them.

Q I want to know the first thing you did.

(Mr. Stevens makes objection but is overruled. Takes exception which is allowed.)

Q Is that the first thing you did was set the post there?

A No. 4, yes.

Q Did you have it there?

A No, I went down and got it.

Q I will ask you where it was left.

A Where were they?

Q Yes, where were they left.

A The road comes up hill—

Q Up hill?

A And half ways up the Horse Shoe Bench the post was thrown off there.

Q In about the center of the Horse Shoe Bench?

A Not quite the center.

Q Which way from the center?

A Nearer north than the center.

COURT: Towards the initial stake?

A Yes sir.

Q How far from the initial stake—about, were they when you went and got them?

A 350 ft. to 400 ft.

Q That would be towards the center of the Horse Shoe Bench from your initial stake about 350—400 ft.?

A It isn't in the center.

Q I said about 350 ft. to 400 ft. from your initial stake?

A But nearer this line—near my end line on

the Horse Shoe Bench than the other way.

Q Were you on snow shoes that day?

A No sir.

Q When you went down and got that stake, did you take both of them up to the northwesterly corner?

A Yes sir.

Q Where was Quigley on that day, do you know?

A I didn't see him at all.

Q And after you set the northwesterly corner stake, then you carried that other one over to the northeast corner and set that?

A I did.

Q Those are the two identical stakes that were there when you were there with Alois Friedrich a short time ago?

A I was not there with him.

Q Weren't you over there at the time?

A No sir.

Q You were not in the Kantishna then?

A No, I was on the claim, but not the day that the lines were drawn.

Q Were you to the stakes while you were over there?

A No sir.

Q You didn't go to the stakes?

A No sir.

Q When was the last time you saw the stakes?

A Before I came out last fall.

Q You went to each one of them?

A Yes sir, went over them all.



Q Before you came out last fall, you found your northeast and northwest stakes to be the same stakes as when you located the claim?

A The northwesterly is the same stake, and the northeasterly is the same stake only it was down and I set it up.

Q But the same stake?

A There are two stakes now—the stake I set up first, also one I made and carried up there last fall. I looked up and couldn't see it so carried up another and found it was laying on the ground and I set them both up together.

Q Both of them were left and are there now?

A When I left last fall, yes.

Q How big a stake is the one in the northwesterly corner?

A The last one—(Interrupted)

Q I mean the northwesterly—is that the same stake you set there?

A In the northwesterly corner, yes.

Q What are the dimensions of that stake?

A The first one I put up—(Interrupted)

Q Were there more than one put up there?

A Do you mean post No. 3?

Q I mean the northwesterly corner stake?

A Yes, it is a big stake—the largest on the claim.

Q There was never a second one put up to your knowledge?

A No never; it is right close by the road.

Q You say it was six inches in diameter?

A Yes sir.

Q Not less?

A I didn't measure—it might be less.

Q How much less might it be?

A It might be one inch—no more.

Q It was a dry stake when you put it up?

A I don't remember whether it was or not. I only know they were both heavy to carry up hill, but I don't remember whether they were dry.

Q You hewed them yourself?

A Squared them, yes.

Q What did you square them with?

A An axe.

Q Did you square them right at the corners or before you carried them up there?

A Right on the road before I went up there and put it on a pile of rocks.

Q You did it right there at that time?

A There at that time, yes sir.

Q And you did the same with reference to the other stake—that is the northeast one?

A Yes, I made the northeast when I made the northwest.

Q Did you do that right there on the road before you carried it over?

A Yes sir, before I carried it over.

Q Was it a dry stake or green?

A It wasn't as big as the other—it was smaller—picked out the lightest one to pack over.

Q It was dry?

A I think so.

Q Both spruce stakes?

A Spruce, yes sir.

Q Where was it that you claimed you made your discovery on the placer claim?

A Right about where the cabin now sets—there is high bed rock there.

Q Wasn't it in front of where the cabin now sets?

A No sir, above it.

Q How far away from the cabin?

A Oh, a few feet.

Q What did you do there towards making that discovery?

A I dug down—took off the moss—and dug down to slide.

Q How deep?

A It wasn't more than two feet.

Q Was it two feet?

A Yes.

Q How many places did you dig?

A Two.

Q How close together?

A I dug three places all together, but panned out of two.

Q You dug three but panned only two?

A Yes sir.

Q Where did you get that pan?

A I brought it down from the mine.

Q From Aitken's mine?

A Yes sir.

Q Was any one with you?

A No sir.

Q That was on the 10th day of September?

A Yes sir.

Q 1919?

A Yes sir.

Q Did you pan any place else on that claim?

A No sir.

Q You never did?

A No.

Q Did you ever point out to any one where you had made your discovery on that placer claim?

A I believe I told when I showed Grant—believe I showed him where I made discovery over there.

Q Did you never show any one else?

A No, I never did.

Q Where did you pan the dirt?

A I panned two pans on Friday Creek and the other one I took up to the mine and panned.

Q Was any one present?

A No sir.

Q Where did you pan it—in the boiler house?

A No, in the bunkhouse—had a tub.

Q Did you keep a pan there for the purpose of panning?

A Yes sir, we had a pan there all the time.

Q You used it in your work?

A Yes sir, when we assayed. Kept it in the assay office.

Q But no one was with you at the time?

A No one.

Q At the time did you tell any one?

A No sir.

Q What did you get when you dug there where

you made a discovery?

A I got slide, bed-rock, slide and schisted bed-rock, some gravel and sediment—sandy sediment.

Q You got gravel?

A Some gravel.

Q This was not slide matter that slid down off the hill?

A I expect so.

Q You are sure there was gravel?

A Yes, there was gravel.

Q Besides this assessment work you did there—you had done there in 1920, what, if anything, did you do on the placer claim as a 'placer claim?

A I hadn't done anything up to that time. I went up there and put a tent up.

Q I mean at any time have you ever done anything besides the assessment work that you had done in 1920. What did you ever do on it as a placer claim?

A I built a cabin, sunk a hole, put up a tent—

Q Where did you sink a hole?

A Sunk a hole down towards the lower line.

Q When did you sink that hole?

A Last fall—last September.

Q That isn't on the map, is it?

A No.

Q Where was it from your initial stake of the placer claim?

A A little over 150 ft.

Q What direction?

A Southeasterly.

Q You mean northeasterly. You say 150 ft.



from the initial stake?

A Yes sir.

Q How far was it from the side line of your bench claim that joins Hamilton's claim?

A About 100 ft. straight up.

Q About 100 ft.?

A Yes sir.

Q How deep did you sink the hole?

A I sank it about 9 ft. and timbered it.

Q Who was with you?

A No one was with me. Mr. Quigley nassed several times but no one was with me.

Q When did you do that work?

A Last fall.

Q About what time?

A About the fore part of September.

Q Did you do that for assessment work?

A I was figuring on trying to get to bed rock but got drowned out. I timbered it up but then it filled up with watetr.

Q Those holes you sunk in 1920 by O. M. Grant—the water came into them?

A Yes.

Q Each one of them?

A No, some the water didn't stay in if it did come in.

Q What ones was there no water in when you examined them the last time?

A These ones below—these three (Indicating on map)

Q Those in line with the lode?

A Yes, but they aren't in line with the lode.

Q How far off are they?

A According to Mr. Friedrich's measurements some are 30 ft. off the line, some 20 ft. off the line. I have helped tape that and if I remember right, there are one or two over 50 ft. off.

Q You take this hole 12 ft. from the discovery shaft of Campbell and Tobin. Was there water in that?

A When I seen it, there was no water in it.

Q When you went over with Alois Friedrich and you helped tape, was there any water or ice in that hole?

A No.

Q That was a dry hole?

A I didn't see the bottom—they had all caved.

Q Wouldn't that indicate there had been water in it?

A No, they cave without water when the ground thaws out.

Q Every time?

A Unless you have it extra cased.

Q It will cave a whole lot?

A Quite a bit.

Q How far will an average hole cave when it stands over a winter?

A When it stands over a winter, it wouldn't cave—it freezes back. New frost goes way into the sides and does not thaw, but a new hole will cave. The frost only cases it, so the hole—

Q The hole that is dug in the winter time, not cased I am talking about—a hole dug there, say

8, 9, 10, 11, or 12 ft. that is not cased—wouldn't that cave?

A It will in summer if it is newly dug.

Q If it is dug in the winter?

A No, sir, it wouldn't cave—it freezes back.

Q It wouldn't cave much the next summer even though it isn't timbered?

A It will thaw out and cave some, but not as bad as a hole dug in the spring.

Q When you went to this shaft of Campbell and Tobin the first time, did the surface of that shaft show that it had caved in?

A Which time do you mean?

Q The first time you saw it after Campbell and Tobin were working there.

A It was timbered.

Q You couldn't tell whether or not it had caved?

A No, I couldn't see it for the timber.

Q This point on this plat here which is marked Plaintiff's Exhibit "A", designated as corner No. 5, Were you there when that was put in?

A No sir.

Q Did you order it put in?

A No sir.

Q You had nothing to do with it?

A No.

Q That was put in by Mr. Friedrich on his own initiation?

A I don't know anything about it.

Q You said something about going down there and talking to Mr. Quigley when Mr. Quigley was

excavating for his house.

A No, I didn't say it.

Q Didn't you say that he said he was preparing to build there?

A I didn't go down to talk with him.

Q But you were there and talked with him when he was excavating for his house?

A Yes sir.

Q Was that before or after this assessment work had been done by O. M. Grant?

A Before.

Q Are you positively sure?

A Yes sir.

Q Are you sure of anything you said?

A Yes sir.

(Mr. Stevens makes objection which is sustained)

Q What was said at that time?

A I said, "Joe, you will soon have work enough done for the assessment." "Oh," he says, "This isn't on your placer at all."

Q That is all that was said?

A At that time, yes.

Q Did you have another talk with him about the assessment?

A Yes sir.

Q Where was that?

A A few days later on—

Q At the same place?

A Near there, yes.

Q What was said at that time?

A He says, "Billy, I will do the assessment

work on the ground if you turn it over to me." I says, "Oh no, I wouldn't do that."

Q That was all that was said?

A That was all that was said.

Q Where—about were you when the conversation took place?

A Standing along the road where the road goes down.

Q Was anybody present?

A Nobody present.

Q Do you know a man they call Big Sandy?

A I do.

Q What is his name?

A I believe his name is Burrows.

Q He is a teamster?

A Yes.

Q Wasn't he present?

A He wasn't in the country at that time—not until a year later.

Q What year was it?

A That was the fall of 1920.

Q And Sandy was not there until 1921?

A He might have been there in the latter part of 1920, but he was not there then.

Q Didn't you have this last talk referred to—didn't you have it with Joe Quigley where he was working in one of his holes in tracing that lode down below the point of discovery?

A No sir, I never visited those holes. I visited his discovery and that is the only hole I was ever at.

Q Now, in about the month of August or Sep-



tember of 1920, there being present yourself and a man known as Big Sandy, at a place about 75 ft. up the hill from the blacksmith shop on the lode claim known as the Red Top Lode Claim of Joe Quigley, did you not have in substance the following conversation with Joe Quigley, in which you asked Joe Quigley what he was doing, and to which he answered he had dug up a pretty nice looking prospect, in which he stated further that he was looking for you to come along as he wanted to get a building site on the flat below on your placer claim, to which you said, Yes he could get a building site if he would turn that work in as representation work on the placer, and to which he replied that he did not think it was on the placer at all: and in which you said, "Oh yes it is, don't you see that stake up there." pointing to the stake above where the warehouse now stands. Did you have such a conversation?

A No sir, and more than that, I was never there with Big Sandy.

Q Did you not, a short time after that in the same year and before the assessment work was done by O. M. Grant on the placer claim, yourself and Joe Quigley being present alone, have the following conversation somewhere on Quigley's Red Top Lode Claim, and at the time when he was working on that claim, in which Mr. Quigley said to you, "If you will make me a bill of sale of that placer claim, I will keep the representation work done on it, as I understand that you located it for warehouse purposes anyway", in which you said you

could'nt do it as you were working for Tom Aitken and you located it for Tom Aitken and that it belonged to him and he would have to see him about it.

A I never made such a statement at all—never.

Q Not in substance—nothing like it?

A No sir, nothing like it. If you will allow, I will tell you what I did tell him.

Court: He may say what he told him, confining his statement to what he said to Quigley at this particular time.

A I told Mr. Quigley that Aitken wanted some place to put up a warehouse and he could put it up on that claim, providing I would get the use of it.

MR. STEVENS: Use of what?

A Use of the warehouse.

MR. ROTH:

Q Do you know of Quigley having gone to Aitken and having gotten permission from him to build his house where he did build it? Do you know that?

A No sir.

Q You don't know it?

A I don't know.

Q Do you know of Quigley having gone to Aitken and gotten permission from Aitken to dump on the placer claim?

A No sir, I don't know.

Q Did you ever make complaint about Quigley being on your placer mining claim with his lode claim?

A No, I didn't.

Q Never made any complaint?

A No, I never made any kick.

Q Did you know how many places that Quigley had opened up that lode along its line there? I mean prior to the time that these defendants went in and located their quartz claim.

A I don't.

Q Did you ever go to this discovery shaft?

A Once.

Q When?

A After he started to dig.

Q After he made discovery?

A I don't think he had made discovery yet—might have been more or less of a discovery as he had float on the way down, but did not have rock in place when I was there.

Q You never did see rock in place?

A No.

Q You didn't see it any other place except in the tunnel?

A No sir.

Q Did you go back to the face of the tunnel?

A I did.

Q Could you tell from anything you saw there how wide the ledge is?

(Mr. Stevens makes objection which is over-ruled. Exception taken and allowed.)

Q Could you tell how wide that ledge is from anything you saw there?

(Mr. Stevens objects. Objection over-ruled. Exception taken and allowed.)

A I don't know how wide it was.

Q Couldn't you tell? Didn't the tunnel show how wide it was?

A The tunnel showed where the ore was in a kidney—a kidney here and a little farther nothing.

Q I didn't ask about the ore. I asked about the width of the lode. The lode may be filled with ledge matter that is not ore. Ore runs in shoots, does it not? I am talking about the width of lode so far as you could ascertain its width from any work done in the tunnel.

A The tunnel at the face is small—it is narrow so they wouldn't have to timber. The face of the tunnel looked like nearly all lode. The tunnel was small—not over at that point, 2½ ft. to 3 ft. high.

Q Was the tunnel perfectly straight?

A No.

Q That would give an idea of the width of the lode?

A No.

Q Then the lode didn't run straight at all?

A The vein don't—it is twisted sometimes in this direction and sometimes off to this side. (Indicating)

Q What was the distance between the walls of that lode?

MR. STEVENS: Do you mean the walls of the vein or the walls of the tunnel?

MR. ROTH:

Q What is the distance any place you could ascertain there between the walls of the lode?

A On that Quigley hill, in that tunnel there is

no walls. Simply first—on both walls no contact—simply you might have a wall and tomorrow there would be no wall at all.

Q There are walls sometimes?

A There are really no walls—there are slips.

Q That is what I call a wall. How far was it between what you call slips on one side and slips on the other?

A At the mouth of the tunnel?

Q Any place in the tunnel.

A There was places I seen there might be 3 ft or 4 ft., probably more, and places only 15 inches, and less.

Q Now, you said something about horses you loaned to William Campbell.

A Yes sir.

Q You didn't charge him anything for them?

A I did not.

Q Was it you who loaned him those horses?

A Yes sir.

Q Whose horses were they?

A They were mine.

Q At that time?

A Yes.

Q Were they yours when he first got those horses?

A Not while he was hauling wood on the hill—not while he was working for Aitken. They were my horses after the first of March—from then on.

Q Isn't it true that his arrangement about those horses was made entirely with Tom Aitken and not with you?



A No.

Q Isn't it true he had the horses for their feed?

A He give them horses with contract for landing wood for so much to furnish horses and feed them.

Q But after that when he kept the horses, isn't it true that he made arrangements entirely with Tom Aitken?

A The horses stayed back—we fed the horses six weeks in the stable and took them to Roosevelt. He didn't have the horses at all.

Q Isn't it true that Tom Aitken tried to sell that span of horses and the whole outfit with them to Campbell?

A That is true. He offered them to him and Mr. Campbell wouldn't take them. When he didn't take them, he turned them over to me and said, "If you want them for their feed, take them, I won't keep them any longer." So I took the horses and paid for their feed.

Q Didn't Campbell feed them when he had them?

A Yes, he half-starved them.

Q You can tell then what he said then.

A He had them twenty-one days on 1000 lbs. of feed—50 lbs. apiece.

Q You wish to be understood positively that that is true?

A Yes sir.

Q Where had he got the feed?

A At Roosevelt.

Q It was Tom Aitken's feed?

A Yes sir.

Q If he would show a receipt that would show that he had paid \$112.75 for the time he had the horses there, will you say that was correct?

A I will have to figure up the feed.

Q What would they pay for feed?

A Oats \$10.75 a sack and hay \$9.00 a bale.

Q What kind of horses were they?

A Fairly small horses—got them in Fairbanks.

Q One was an old fire horse?

A No sir, not that I know of.

Q The little mare was very old—the bay?

A Some say she is and some say not. Mr. Quigley says she was the first animal in Fairbanks and Jack Howell says she is a young mare.

Q You say you don't know that it was an old fire horse from the town of Fairbanks?

A No I don't know.

Q How small a horse?

A Between 1100 lbs. and 1200 lbs.

Q Was it that much?

A I think so.

Session 2:00 P. M. February 3rd, 1922.

WILLIAM GRANT, witness in his own behalf, heretofore sworn, testified:

**Cross Examination, (Continued.)**

BY MR. ROTH:

Q You say you had a conversation with Mr. Quigley last September—that would be September 1921—before you came out of the Kantishna?

A Yes sir.

Q What did Mr. Quigley say to you in that conversation?

A He said the tunnel wasn't on the placer.

Q What brought about that conversation?

A I measured the placer at that time—measured up from the lower end line to the mouth of the tunnel.

Q What brought about the conversation?

A I went up with the tape line and I says, "Joe, the tunnel isn't on the placer." "No," he says, "the tunnel isn't on the placer:"

Q Who was with you at that time?

A Mr. Tuell.

Q Who helped you measure?

A I measured it myself.

Q Now you say that when Mr. Campbell came over there with the team to Roosevelt he stayed there how long?

A A few hours.

Q He didn't stay all night?

A No sir.

Q Are you sure he didn't?

A I am sure.

Q Didn't Geo. Wesch make him a bed on the floor?

A No sir.

Q Now with reference to the time you put up those notices that you call trespass notices. When was it you posted those notices?

A Some time in June—the latter part of June.

Q Have you the date?

A I don't remember whether I have the tres-

pass notices down here or not. It was towards the end of June. It was the first mail going through after the break-up. It was in June I know. (Refers to memorandum book) No sir, I haven't got it.

Q Did you put those notices up the first trip you made from Roosevelt there?

A Yes sir.

Q Are you sure it was the first trip?

A Yes sir.

Q Who came with you this time you made the first trip?

A George Moody, two Mr. Ellis' from California, Doc Layman and Mace Farrar. I think that is all.

Q You made a trip before that?

A No sir.

Q Do you know a man by the name of John Biglow?

A Yes, John Biglow was with us.

Q Yes, but didn't John Biglow go with you a trip before that?

A No sir, that is the first trip.

Q With whom did George Biglow come to Roosevelt—I mean John Biglow?

A He came to Roosevelt at the same time.

Q Be sure. Didn't he come with George Black?

A I guess you are right. George Black and Moody came within a few days of each other.

Q Just as soon as John Biglow got there with George Black, didn't he start with you immediately—didn't you start immediately after John Biglow got there, before the mail got there, and you went

over to this placer claim on the 23rd day of June—I will make it exact?

A No sir, I couldn't have done that—it would be impossible.

Q Didn't you right there on that placer claim and just a short distance from the discovery shaft of Campbell and Tobin, introduce John Biglow to Joe Dalton, after which didn't you and Joe Dalton and John Biglow go up to Quigley's house?

A Yes sir.

Q And that was not the trip you took the mail?

A Yes sir.

Q You are sure it was the trip you took the mail?

A Yes sir.

Q You are clearly sure about that?

A Yes sir.

Q And isn't it true that you left there the next day and went back to Roosevelt and then brought the mail and this crowd of people of whom you mention over, arriving over there in the vicinity of this claim on the 3rd day of June—to be exact?

A No sir.

Q When was it you got this information from Jake Howell that Campbell and Tobin were on the placer claim—on the Hill Bench placer claim?

A When navigation opened.

Q When was that?

A Along towards the first of June—about the first of June, or probably in June.

Q Is he the first one that gave you the information of that?



A Yes sir, as soon as the 'Reliance' got in.

Q Who came up on the "Reliance"?

A Jake Howell came up on the 'Reliance' into the Kantishna and came back out and went down river.

Q When he came back out?

A Yes sir.

Q You say it was about the first of June?

A I didn't give any date, but it was after navigation opened.

Q But navigation opened earlier than that, didn't it?

A The boat had to go from Fairbanks up and it took some time.

Q What was it you told Campbell when he left the horses?

A I told him I would be up as soon as I got through there to go to work on the placer claim.

Q Did you tell him what work you and George Wesch were going to do.

A No sir.

Q Didn't you tell him you and George Wesch were going to go there and pick up Quigley's lode?

A I did not.

Q Was you or George Wesch going to work that claim as a placer claim?

A Yes, we were going to do work.

Q Were you going to do work on it as a placer claim?

A Yes sir.

Q For placer purposes?

A I don't remember what we were going to do

—whether it was placer or quartz. I don't think that had been determined when we went up.

Q How much gravel did you see on that claim?

A This last hole I dug last fall—(Interrupted)

Q I am talking about before that, at or before the time these defendants entered upon their quartz claim and made a discovery. How much gravel did you see on that trip?

A In them holes that were dug and exposed there was gravel through them all—in all the dumps.

Q It was not slide, was it?

A There was some slide, yes. In some holes there was slide, and others not.

Q Were any of them pure slide and no gravel?

A There was more or less slide mixed. Was up on the hill and among that slide there was wash gravel—towards the bottom of the holes gravel shown up.

Q To what extent?

A Would find chunks of gravel through the slide.

Q From the time you staked the ground on the 19th day of April 1920 up to the first day of June 1921, you didn't do any development work on that claim as a placer claim, did you?

A Yes sir.

Q What did you do?

A I sunk them holes.

Q That was assessment work. Did you do any development work on the claim?

A No.

Q Have you done any work at all?

A Yes sir.

(Mr. Stevens makes objection to the question which is not acted upon as witness had already answered.)

Q Now you say you sunk a hole last fall before you came out here?

A I started it, yes.

Q How deep did you sink it?

A Nine feet.

Q Wasn't it only four feet?

A Nine feet—I measured it.

Q You measured it?

A Yes sir.

Q And did anybody interfere with you doing that?

A No sir.

Q Nobody interfered?

A No.

Q Now will you explain to me, Mr. Grant, how it comes you are so very positive that the discovery shaft of Campbell and Tobin was the hole that you caused O. M. Grant to sink 12 ft.—the first hole at the place where you indicated?

A I positively know the hole.

Q Alright, explain how you positively know that hole.

A I measured that hole from Quigley's center end line stake of his claim 25 ft. down.

Q When did you measure it?

A Before he started to work.

Q Before who started to work?

A O. M. Grant.

Q You measured it?

A Yes sir.

Q Now there is another hole there within 12 ft., is there not?

A Yes sir.

Q And that hole that is within 12 ft. you say O. M. Grant did not sink?

A Yes sir.

Q How do you know he did not sink it?

A I was there off and on when he was working and he showed me the holes he dug, and I measured every one. I was there and accepted the work and I know that hole wasn't there then.

Q Because you measured it?

A I measured them all.

Q How did you measure?

A I measured all with a tape line.

Q You of course, were not there when Campbell and Tobin started to sink?

A No sir.

Q Now at this time that O. M. Grant did the assessment work down there, what were you doing?

A I was working up on the claim.

MR. STEVENS: What claim?

A Aitken's mine.

MR. ROTH:

Q When you went in there did you take any outfit at all into the Kantishna personally, or was it all Aitken's outfit?

A No, I had stuff belonging to myself.

Q What was it?

(Mr. Stevens objects as irrelevant, incompetent and immaterial. Objection is sustained.)

Q Where was Tobin at that time—at the time the work was done by O. M. Grant on this placer claim?

A I don't know.

Q Where was Campbell?

A I believe Campbell was hauling wood or meat, if I remember right, at the time the assessment work was being done.

Q Did you try to get some one—(Interrupted)

A I think Tobin was doing assessment up on the hill—am not sure, but I think so.

Q Did you make any effort to get any one to help O. M. Grant?

A Yes sir.

Q How much of an effort?

A I tried all over the country to get a man.

Q Did you try Mr. Tobin?

A I think Mr. Tobin was already working—I am not sure. I know he did do assessment that fall.

Q Your idea about getting some to help sink a hole to bed-rock was because it was in line with Quigley's lode?

A No sir. It was to try to get to bed rock on the placer claim and probably if we found float there—

Q But at the place where you had lined up Quigley's lode?

A I never lined up Quigley's lode.

Q Didn't you say you lined up with Quigley's lode and that you directed O. M. Grant accordingly?

A I did.



Q At that place you wanted to sink a hole to bed rock?

A Yes sir.

Q And that was in September—or what month was it he did that work—in November?

A November.

Q November 1920?

A Yes.

Q And you couldn't find any one to help do the work?

A No sir. I had to send to Glen to get a man to do assessment work on Aitken's property.

Q You hunted all over the country and stated you couldn't get a man to help Grant go on the windlass?

(Mr. Stevens makes objection, same being over-ruled. Exception taken and allowed.)

A I asked several around there and asked Grant to try and get his partner but at that time he was hunting in the sheep hills and he couldn't get him.

Q Now you stated you staked a claim up on Friday Creek a placer claim.

A Yes sir.

Q When did you stake that claim?

(Mr. Stevens objects as not proper cross examination. Objection over-ruled. Mr. Stevens makes further objection on the ground that it is not best evidence when he staked it, as that claim is not in controversy in this suit and it is absolutely immaterial. Objection over-ruled.)

A No. 1 placer claim south of Friday Creek, April 19, 1920.

Q The same day?

A Yes.

Q Joe Quigley was up there with you?

A Yes.

Q You staked it for Tom Aitken?

A I staked it for William Grant.

Q You didn't stake it for Tom Aitken in your name?

A I did not.

Q And didn't Quigley go up there and show you where the corners were for the purpose of staking for Tom Aitken?

A He did not.

Q Let me call your attention again to this stake up here—this northwesterly corner stake of your placer claim—on that same day, being the 19th of April, 1920, is it not a fact that Joe Quigley went with you personally, after you had written on this southwesterly corner stake of the Hill Bench Claim—didn't Joe Quigley go with you personally up to the northwesterly corner stake of the Hill-side Bench, you picking up the stake on the way and wasn't he with you when you set that stake, and didn't he help you put stones around the bottom?

A No sir.

(Mr. Stevens objects to Mr. Roth assuming a fact not in the testimony, being that the northwest corner stake was set on April 19th, whereas testimony shows it to have been set on the 20th of April. Court sustains correction, and Mr. Roth agrees.)

Q On the 19th day of April 1920 you wrote on the southwesterly corner of the Hill Bench Claim?

A No sir.

Q You didn't? When did you?

A On the 20th.

MR. STEVENS: Mr. Grant, will you please pay attention to the questions asked.

MR. ROTH:

Q I am talking about the southwesterly corner which you designate as your initial post. What date did you set that?

A April 19th.

Q On the same day, April 19th, is it not a fact that you and Joe Quigley went up on to Friday Creek and that you staked a claim there?

A No sir, it was taken before we came down.

Q But on the same day?

A Yes sir.

Q It is so, you staked it on the same day?

A Yes sir.

Q On that same day, isn't it a fact that when you came back from Friday Creek and you wrote on this initial post, that you and Mr. Quigley together went up to this post which now stands above Quigley's house, representing the northwest corner of the Hillside Bench Claim, isn't it so that Quigley went with you up there on the same day?

A I didn't put up that corner on the same day.

Q Isn't it so, Quigley was with you when Quigley picked up the stake you set up there, and that you hewed it off and carried it up there and set it,

and after setting the stake, you and Quigley went on up the hill?

A No, it is not so.

Q Do you remember Mr. Tobin coming over to Roosevelt in the month of June 1921?

A Yes sir.

Q Do you know what time of the month he got over there?

A No, I don't—I seen him there but—

Q Did you have any conversation with him about the work he was doing on the Hill Placer Bench?

A Not at all.

Q You didn't talk about it?

A No sir.

Q Did you know he had been on there at that time?

A Yes sir.

Q Why didn't you say anything to him then?

(Mr. Stevens makes objection, and objection is sustained on account of being immaterial. Exception taken and allowed.)

Q At any rate, at the time Mr. Tobin was over there, you knew that Tobin and Campbell was working there—had been working on a quartz claim that they claimed to have located and that they had sunk a shaft and were working on that ground. You knew it when he went over to see you about horses?

A Who did?

Q Mr. Tobin.

(Mr. Stevens makes objection, same being sustained.)

Q Did Mr. Tobin go over there to talk to you about purchasing those horses in the month of June 1921 at Roosevelt?

A Yes, he did say something about horses—wanted to know if I wanted to sell them.

Q At that time you knew that he was working on the superficial area of that Hill Bench Placer Claim, did you?

A No, I didn't.

Q You didn't know it at that time?

A I knew he had been there, but didn't know he was still there.

Q Had you heard that they had made a discovery by the time he was over there?

A I don't know whether it was before or after they made a discovery.

Q Now you say that in July of 1921 you first saw this hole that is designated on this plat as being about 12 ft. from the Campbell and Tobin discovery shaft. Do you understand the question?

A No sir.

Q I understood you to testify that in July you first saw that hole which is about 12 ft. from the Campbell and Tobin discovery shaft, which was then about five or six feet deep, and that it was a fresh hole.

A If I testified that way I was mistaken. I seen the hole when I went up to post the notices in June.

Q You first saw it in July?

A I saw it when Mr. Clark and I went up to



post the notices.

Q When who?

A Mr. Joe Clark.

Q What date was that that you went there to post notices?

A I can't give the date—it was the latter part of June. At that time I was a little mixed on dates as I had no calendar.

Q When was it you saw them raise material out of the hole that looked like ledge matter?

A When I went back and pitched a tent.

Q When was that?

A Between the 20th and 25th of July.

Q Between the 20th and 25th of July?

A Yes sir.

Q 1921?

A Yes.

Q Mr. Grant, when did you first notify Mr. Tobin and Mr. Campbell to get off that ground—personally?

A I never notified them personally—I couldn't find them. I notified them by registered letter and by notices.

Q You notified them by registered letter?

A Yes sir.

Q When was that?

A I don't remember that date—along in July some time.

Q This trouble that you say occurred between you and Campbell when you say he threw stones at you as big as your fist occurred along after Campbell and Tobin had bed-rocked their hole and

staked the ground? Didn't it?

A Yes sir.

Q What was the size of the rock that hit you on the back?

A About the size of my fist but a little long.

Q And it hit you pretty hard?

A It certainly did.

Q It knocked you down?

A Lost the use of my leg when I went down.

Q When did you recover the use of your leg?

A A few minutes after.

Q Were you ever examined by a doctor?

A I never was.

Q They had a doctor there and offered you this doctor for examination, didn't they?

A They never offered nothing.

Q Wasn't Dr. Sutherland there and wasn't his services offered you for examination?

A No sir.

Q Dr. Sutherland attended the hearing, didn't he?

A Yes.

Q Didn't you apply to him for examination?

A I did not.

Q How far was he away from you when he threw the rock?

A About twenty or twenty-five feet—probably thirty.

Q Do you recollect having a conversation with Mr. Tobin down about the side line of that placer claim there?

MR. STEVENS: Which side line?

MR. ROTH: I mean the southerly end line of Campbell and Tobin's quartz claim.

A Yes.

Q When was that?

A That was after I posted the notices when I was going back the first time with the mail.

Q Do you know the date?

A No, but Mr. Moody was with me—you probably can get the date from Mr. Moody—I was in charge of the mail—you probably can get it from him.

Q How does the road run along—I mean the road running up to Aitken's mine at that time?

A Coming up?

Q The main road enters towards the easterly end of the southerly end of the Hillside Bench claim near the center of it and goes in a northerly direction up to about the center of the claim—is that it?

(Mr. Stevens objects to counsel testifying.)

Q Tell how the wagon road runs.

A It starts in a southeasterly direction—it runs up in a—(hesitates)

COURT: Go ahead and as near as you can describe the course of the trail.

A It starts up in an easterly direction and swings around in a northerly direction, runs up below the mouth of the Red Top tunnel, on up above the Quigley residence, up to where No. 4 corner is, then swings back east and goes on up the hill.

Q Do you know where the Haney road joins that road?

A The Haney road joins it somewhere below the southeast corner of the Red Top.

Q How close to the southeast corner of the Red Top.

A I never measured it.

Q About how far—100 ft.?

A I couldn't say—I don't know—never paid much attention to it.

Q But it is on the Hill Bench Placer?

MR. STEVENS: What is—the junction?

MR. ROTH: Yes, where the junction joins.

A Yes.

Q It is on the Hill Bench Placer?

A Yes.

Q Do you remember having a conversation with William Campbell in the bunkhouse up at the Aitken mine in the evening after supper about February 1, 1921, in which Campbell (the Aitken crew being present but not being able to state just who they were)—in which Campbell stated that Quigley had started his tunnel, and when you asked him where he started the tunnel he stated about thirty or forty feet below the blacksmith shop, in which you stated that that was away below his line, and Mr. Campbell then stated, "No, his end line is fully 100 ft. below that," and in which you stated, "Well, I don't know about that," or words to that effect, "but I do know that it is below the side line of my placer claim", and in which you stated that Quigley could just as well have turned in that dead work as assessment work on the placer claim and have saved Tom Aitken \$100.00?

A I never made no such statement.

Q Did you have such a conversation?

A I had no such conversation in the bunkhouse.

MR. ROTH: That is all.

### **Re-Direct Examination**

BY MR. STEVENS:

Q Mr. Roth has introduced in evidence here as Defendants' Exhibit "1", the affidavit of assessment work or labor by O. M. Grant. You examined it, did you not?

A Yes sir.

Q On the back of it, it states that it was filed at the request of T. P. Aitken. Do you know anything about how that came to be stated on there that it was filed at T. P. Aitken's request?

A Yes sir.

Q Explain.

A Mr. Wilson told me he would put my papers in with Mr. Aitken's and mark them so they would be all together.

Q You were working for Aitken at that time?

A Yes sir.

Q Were you present when Mr. O. M. Grant made this affidavit?

A No sir.

Q Do you know whether or not O. M. Grant made the affidavit before the Commissioner or just left it for filing?

A I don't know. I went down and paid for it later and that is all I know.

Q You paid for the recording of it?

A Yes sir.



Q As I understand your testimony, Mr. Aitken never had any interest in this placer claim at all?

A None whatever.

Q And he hasn't now?

A He hasn't now.

Q You stated to Mr. Roth this forenoon in cross-examination, as I have it, that you based your discovery—you based your location of the quartz claim on the fact that the vein upon which you located was commonly known as a 'known vein'. Explain what you mean by that.

A After Mr. Campbell and Mr. Tobin discovered it there.

Q You mean it was well known—it became well known after Campbell and Tobin opened it up?

A Yes sir.

Q Had it ever been known to exist within the boundaries of your placer claim before Campbell and Tobin opened it up?

A No sir.

Q And before you located your quartz claim, you saw and examined the vein matter that had been taken out of the hole by Campbell and Tobin? Is that true?

A Yes sir.

Q You stated it was of such a character that you could tell that it came from a ledge or lode or vein in place—I don't mean a ledge—I mean a vein or lode in place. Is that true?

A Yes sir.

Q You described in your direct examination, and also in your cross examination to Mr. Roth,

that when you staked —placed the corner stakes—the four corner stakes of your quartz claim, that you designated the northwest corner as the “northwest corner” on the stake?

A Yes sir.

Q And the northeast corner as the “northeast corner” on the stake?

A Yes sir.

Q And likewise the southwest corner?

(Mr. Roth makes objection which is overruled)

Q You also stated that the southeast corner you designated by marking “southeast corner” on the stake. Is that true?

A Yes sir.

Q In answer to the next question of Mr. Roth's you stated—the record shows you stated then that on all four corners you put the numbers, No. 1, No. 2, No.3 and No. 4. Is that your testimony? Was that intended to be your testimony?

A No sir.

Q State what the facts are.

A The facts are that I got mixed up between the placer stakes and the quartz.

Q When?

A During the testimony.

Q Which testimony?

A Mr. Roth's cross-examination.

Q Explain what the facts are.

A The four corners of this quartz claim—(Interrupted)

Q Which quartz claim—yours?

A Yes. The southeast, northwest, and so on—are not numbered.

Q Then you were mistaken when you told Mr. Roth they were numbered?

A Yes, I got mixed up.

Q When Mr. Roth was asking you what was on stake No. 4 of your placer claim, which would be the northwest corner, you stated to him that you put on the month of July 1921. What date did you put on?

A I put on April 20th.

Q It wasn't July at all then?

A No sir.

Q Why did you say it to Mr. Roth?

A I got mixed up.

Q You were mistaken and desire to have your testimony corrected to show as April?

A Yes sir.

Q As I understood you in answer to Mr. Roth's question in cross-examination, he asked you, after going in a southwesterly direction and locating the quartz claim known as the Hillside Quartz property he asked you how far it was from your upper end line down to the lower side line—how far it was, and you said you didn't know—might be 500 ft. or 600 ft.—the lower side line of the placer—you said might be 500 ft. or 600 ft. Don't you know as a matter of fact?

(Mr. Roth makes objection and same is sustained, but Court rules that witness may state what it is.)

A About 400 ft.

Q You never measured and don't know exactly?

A It is about that.

MR STEVENS: That is all.

(Recess of 15 minutes until 3:20 P. M.)

(Testimony of Wm. Grant)

### RE-CROSS EXAMINATION

BY MR. ROTH:

Q This affidavit of labor for the assessment work on that placer claim was recorded by you personally, was it not?

A No sir.

Q Well, you were there at the time it was recorded, were you not?

A No sir.

Q You were not?

A No sir.

Q Weren't you there when Mr. Grant swore to this affidavit?

A No sir.

Q Now you say you got mixed up with reference to what your testimony shows on cross-examination with reference to stakes on your quartz claim?

A Yes sir.

Q Now isn't it a fact that I asked you all about the stakes on that quartz claim before I asked you anything about the placer claim?

(Mr. Stevens makes objection which is over-ruled.)

Q Isn't that true? Isn't it a fact I started cross-examination with you, examining you about the stakes on this lode claim—Hillside Bench Lode Claim?

A I understand you started in on the placer claim.

Q Mr. Grant, what was it mixed you up on your testimony you gave with reference to the post on the quartz claim or lode claim?

A Just got mixed up.

Q You heard it stated "northwest—July 25, 1921". You certainly could not have been thinking about the placer claim?

A It don't look like it, but I don't remember—have a poor memory.

Q Isn't it a fact, now it has been called to your attention that you made a mistake, that you tried to rectify by saying you got mixed up?

A No sir.

Q That is not a fact?

A I made a mistake I told you. I made a mistake—I didn't intend to make a mistake—only a mistake I couldn't help, and not for any purpose.

Q Isn't it true, Mr. Grant, that you were instructed—you got information as to what the law was with reference to what should be on stakes and that you were charging your mind with the facts necessary to be on those stakes under the law, and that is what confused you?

(Mr. Stevens makes objection unless counsel fix the time instructions—legal instructions, he presumes—were received—whether it was before he located claim or after. Court rules that matter should be called to the witness's attention definitely.)

Q Isn't it true, Mr. Grant, that after this action was brought that you got information—I am not intending to say you got legal advice, but what I



mean to say is this—if you did not get information as to what the law was with reference to the stakes of a placer claim and a quartz claim, and what was necessary under the law to be put on those stakes, and that your effort to remember what was required to be put, under the law, on stakes on quartz and stakes on placer claims is what confused you? Isn't it true?

A No sir, that is not true.

Q Mr. Grant, isn't it true that under your testimony here with reference to what was on the stakes of your placer claim, did not have—that what was written on your placer stakes, according to your testimony here, was not contained in your notice of location which you recorded? Isn't that true?

(Mr. Stevens makes objection as improper recross-examination. Mr. Roth agrees to withdraw question.)

Q Did you get mixed up or mistaken about anything else that you testified and would like to correct?

A I might of, if I knew what it was.

MR. ROTH: That is all.

MR. STEVENS: That is all.

J. B. Quigley, called as a witness for plaintiff, after being duly sworn, testified:

### **DIRECT EXAMINATION**

BY MR. STEVENS:

Q Please state your name.

A J. B. Quigley.

Q You are the owner of what is know as the Red Top Quartz location in the Kantishna precinct, Alaska?

A Yes sir.

Q Did you locate that quartz claim?

A I did.

Q About what time, do you know?

A I couldn't tell the exact date—think it was August or September.

Q What year?

A 1920, I think.

Q Did you make discovery of a vein or lode of rock in place prior to your location?

A I did.

Q Was it of sufficient value to justify an ordinarily prudent man to expend further time and means in the development of the property?

A I thought it was.

Q You therefore located it?

A Yes sir.

Q Did you stake the boundaries of the claim?

A I did.

Q How far did you claim along the lode up hill from your discovery shaft?

A I don't remember the distance. I measured it off.

Q You didn't claim any particular amount above on your ledge at the place of discovery—you didn't describe it that way?

A I described it that way on the discovery notice, I think.

Q How far down from the discovery shaft did you claim?

A I don't remember. I measured it with a tape.

Q How long was your claim staked—about?

A 1500 ft.

Q And approximately how wide?

A I staked it 600 ft. wide.

Q It amounted to a matter of approximately 300 ft. on either side of the center?

A Either side of the center.

Q Did you after making your discovery and marking boundaries—did you file a location certificate?

A I did.

Q Will you examine the paper I hand you? (Hands him paper) Read it over and say as near as you can—state whether it is a copy—just in a general way. That purports to be a certified copy. Is that the only certificate you filed?

A That is, as near as I can remember.

Q Did you file only one certificate?

A I did.

Q You didn't file any more than one certificate for that particular claim?

A One certificate for this claim.

MR. STEVENS: We ask that this be introduced in evidence and marked Plaintiff's Exhibit "D".

(Same is admitted in evidence and marked Plaintiff's Exhibit "D". Mr. Stevens reads it to the jury as follows:)

"No. 2932. Notice is hereby given that on the  
"7th day of August 1920, I discovered a lode  
"of rock in place bearing gold, silver and  
"other valuable deposits which lode I named  
"the Red Top Lode. Thereafter I located a  
"claim thereon which is bounded and describ-

“ed as follows to-wit: Commencing at post  
“No. 1 or initial post which post is blazed on  
“sides facing the claim and marked corner  
“post No. 1 Red Top Lode claim, thence run-  
“ning 1500 feet in an northeasterly direction  
“to post blazed on sides facing the claim and  
“marked corner post No. 2 Red Top lode  
“claim, thence running 600 feet to southeast-  
“erly direction to spruce post blazed on sides  
“facing the claim and marked corner post  
“No. 3 Red Top Lode claim, thence running  
“1500 feet in a southwesterly direction to  
“spruce post blazed on sides facing the claim  
“and marked corner post No. 4 Red Top Lode  
“claim, thence running 600 feet in northwest-  
“erly direction to initial post or place of be-  
“ginning. Said claim is named the Red Top  
“Lode claim and is situated on the north side  
“of divide between Eureka and Friday Creeks  
“and joins the northwesterly side line of the  
“North Star Lode Claim, in the Kantishna  
“Precinct, Alaska.

J. B. Quigley, Locator.

“Filed for record 9-15-20 at 10 A. M.

C. Herbert Wilson,  
Commissioner and Recorder.

“This is to certify that the foregoing is a  
“true and accurate copy of the document  
“known and described as No. 2932 Volume 1  
“of General Records of the Kantishna Pre-  
“cinct, Territory of Alaska. In witness where-



"of I have hereunto set my hand and seal the 15th day of November 1921.

(SEAL)

C. Herbert Wilson

U. S. Commissioner and Recorder."

BY MR. STEVENS:

Q Mr. Quigley, do you know about how many feet it is, measuring along the surface of the ground between your discovery shaft and the lower end line of your Red Top Claim?

A I don't know now, but I measured it at the time.

Q Approximately—can you tell?

A No, I can't tell approximately.

Q Can you give us any idea?

A No, there is a notice at the discovery that calls for about—a certain length one way and a certain length the other way. I couldn't measure with the slope of the hill.

Q Do you think it is over 400 ft? Do you think 439 ft. would be somewhere near the distance between your discovery and the lower end line?

A It is somewhere around in that vicinity—I couldn't tell you 100 ft. either way.

Q You went down hill some distance from the discovery shaft and started a tunnel into the hill towards your discovery shaft, did you not?

A Yes sir.

Q You know where the mouth of the tunnel is?

A Yes sir.

Q There is only one mouth of the tunnel?

A Yes.

Q And you only run one tunnel in that vicinity?



A Yes I only run one tunnel you could call a tunnel.

Q State whether or not the lower end line of the Red Top Quartz claim is a considerable distance further down hill than the mouth of the tunnel.

A The lower end line is considerably lower down.

Q About how far below the mouth of the tunnel?

A I couldn't tell the distance.

Q I want it approximate. Do you think 173 ft. would be somewhere near the distance?

A I couldn't tell you more than just by looking—I don't have the least idea by measuring up.

Q It is over 100 ft?

A I would guess it would run more than 100 ft.

Q Wouldn't you say, getting it approximately, it would be somewhere between 100 ft. and 200 ft. from the mouth of the tunnel to the lower end line?

A I couldn't tell you—I never measured it.

Q You said over 100 ft?

A Well, it may be—it may be more than 100 ft. and it may be less.

Q How much less?

A I couldn't say it was less—I don't know.

Q You are certain it is over 75 ft?

A I don't know—I never measured it.

Q Well you are certain it is over 50 ft?

A Sure, I think it is over 50 ft. or 75 ft., but I don't know.

Q Coming down hill from the mouth of the tun-

nel to the end line, wherever it is, have you a center end stake?

A Yes sir.

Q Did you put any writing on the center end stake?

A Yes sir.

Q What did you write?

A I marked it the southwest center end, Red Top Lode Claim.

Q Did you put your name on it?

A Yes sir.

Q The date of location?

A Yes, I aimed to put my name, date, and name of the claim on each corner stake and on center end.

Q How about—did you have an upper center end stake?

A Yes sir.

Q As I understand, you had a stake at each four corners and a stake at the center of each end?

A Yes sir.

Q You say you had them all marked that way—designated each corner what it was?

A Yes sir.

Q Were they good substantial claim stakes?

A Yes sir.

Q Could the ground—the boundaries be traced readily from the stakes you staked?

A Yes sir.

Q And you ever since that location—you have claimed and you now claim that is a valid quartz location?

A I do.

Q And it belongs to you?

A Yes sir.

MR. STEVENS: You may take the witness.

**Cross-Examination**

BY MR. ROTH:

Q You say you made a discovery there?

A Yes sir.

Q How much of a discovery did you make there?

A I made several discoveries there.

Q Where are they?

A They are on line up hill from the tunnel.

Q How many?

A I think it was four holes I dug.

Q Above the tunnel?

A Yes sir.

Q Besides the tunnel?

A Besides the tunnel.

(Mr. Stevens objects on account of not being proper cross-examination it having been demonstrated that he made a valid discovery, and improper how many more he made. Objection over-ruled Exception taken and allowed.)

Q With reference to the time you made discovery in the tunnel, as you stated—when did you make discovery in those four holes—was it before you started the tunnel?

A I made discovery in the four holes before I started the tunnel—started the tunnel some time in January I think, I am not—(Interrupted)

Q Of what winter?

A Last winter. It was January or the first part of February.

Q Where were the four holes that you opened the ledge on?

(Mr. Stevens makes objection which is overruled. Exception taken and allowed.)

Q Where were they?

A Right in line—right up the hill from the tunnel.

Q How far from the tunnel?

A I couldn't state the distance—I never measured it.

Q How did they line up?

A They lined up perfect, practically—as near as I can tell.

Q With the tunnel?

A With the tunnel.

Q How deep is the tunnel?

A The last time it measured a little more than 240 ft.—250 ft.

MR. ROTH: That is all

MR STEVENS: You didn't make any discovery down hill from the mouth of your tunnel, between the mouth of the tunnel and the lower end line?

A No sir, I didn't.

MR STEVENS: That is all.

MR ROTH: That is all.

WILLIAM J. CAMPBELL, called as a witness for the plaintiff, being duly sworn testified:

### **Direct Examination**

BY MR. STEVENS:

Q State your name.

A William J. Campbell.

Q You are one of the defendants in this case?

A Yes sir.

Q You with your co-defendant, Mr. Tobin, claim to have located a quartz claim known as the Silver King Lode Mining Claim?

A Yes sir.

Q Along about the 6th day of June 1921, is that true?

A Yes sir.

Q You filed a location notice some time after that time?

A You mean filed with the Recorder?

Q Yes.

A Mr. Tobin did.

Q What is known as the location certificate for that claim?

A Yes sir.

Q It was soon after—along about the 6th of June?

A When we filed it?

Q Yes.

A I think it was in the month of July.

Q It was within ninety days?

A Yes sir.

Q Did you see the certificate of location?

A Yes sir.

Q Before it was filed?

A Yes sir.

Q The statement made in that location with reference to the date of your discovery of a vein or quartz in place was correct, was it not?

A I think it was.



Q To refresh your memory—I can show you a copy of the certificate. The certificate, as I understand it—(Interrupted by Mr. Roth)

(Mr. Roth objects as not set up in the pleading. Court assents.)

Q The certificate may not be quite plain. It speaks of having discovered and located the claim on the 6th of June 1921. Now state what the true date of your discovery was—whether the 6th or 1st day of June—discovery of the quartz vein or lode in place.

A It was supposed to be the first day of June.

Q 1921?

A That's what Mr. Tobin told me.

Q You never made discovery before that?

A I don't know for sure—cannot swear to date.

MR. STEVENS: We offer in evidence certified copy of location certificate.

(Mr. Roth objects because it is a copy. Court says it may be introduced if it can be shown he has possession of the original. Mr. Stevens argues that statute says certified copies of any public document may be admitted. Mr. Roth states he delivered original and had certified copy made at time deposition was taken and that original must be with deposition now in possession of the Clerk. Original itself delivered to the notary who took deposition of Mr. Campbell at the instance of Mr. Stevens and it is here. (Indicating in Clerk's possession.) Court states hasn't had occasion to look it up. Stipulates that deposition may be published. Deposition opened but original certificates can not be found.)

MR. STEVENS: Not being able to find—not having the original, I renew my offer to introduce the certified copy in evidence.

(Mr. Roth objects to it on the ground that same is irrelevant, incompetent and immaterial at this time. It isn't a certificate of location with reference to claim of plaintiff, therefore, as far as defendants are concerned, it is irrelevant, incompetent and immaterial. Court over-rules objection and certificate is admitted as Plaintiff's Exhibit "E". Exception taken and allowed.)

(Mr. Stevens reads Plaintiff's Exhibit "E" to the jury, as follows:)

"Certified Copy. No. 3147. Notice is hereby  
"given, that the undersigned, a citizen of the  
"United States, having discovered at the place  
"where this notice is posted on this the 6th  
"day of June 1921, a vein or lode of quartz  
"or other rock in place bearing gold and other  
"valuable minerals, does hereby locate and  
"claim the same as the Silver King Lode  
"Mining Claim. The general course of the  
"vein or lode as far as the same can now be  
"ascertained is southwesterly and the under-  
"signed hereby locates and claims the same  
"1470 feet in a southerly direction and 30  
"feet in a northeasterly direction from the  
"point of discovery, where this notice is posted  
"and a total width of 600 feet, the same being  
"300 feet on each side of the said vein. This  
"claim is situate on the left limit of Moose  
"Creek in the Kantishna Mining and Recording

"Precinct, Alaska. Notice dated and posted this  
"6th day of June 1921.

"J. L. Tobin.

"William J. Campbell

"Locators.

"Filed for record 7-7-21 at 8:35 P. M.

"C. Herbert Wilson

"Recorder.

"This is to certify that the foregoing is a  
"true and accurate copy of document No.  
"3147 records of the Kantishna Mining and  
"Recording Precinct. In witness whereof I  
"have hereunto set my hand and official seal  
"this 20th day of September 1921.

"C. Herbert Wilson.

"United States Commissioner.

(SEAL) and Recorder."

MR. STEVENS: That is all, Mr. Campbell.

### Cross-Examination

BY MR. ROTH:

Q You saw the original certificate of location  
that was recorded?

A Yes sir.

Q Did you read it?

A Yes sir.

Q Did you see original—what became of the  
original?

A I gave it to Mr. Stevens in Mack's office and  
gave it back the next day.

Q Did you see copy of the original that was pre-  
pared by Mr. Geoghegan?

(Mr. Stevens objects as not being proper cross-examination. Objection sustained.)

Q That original you say you gave to Mr. Richard Geoghegan—you say you gave to Mr. Stevens?

A Yes sir.

(Mr. Stevens objects account not being proper cross-examination. Court states that witness has already testified but over-rules the motion. Exception taken and allowed.)

MR. ROTH: That is all.

MR. STEVENS: That is all.

JOHN BUSIA, called as witness for the plaintiff, being duly sworn, testified:

### **Direct Examination**

BY MR. STEVENS:

Q What is your full name?

A John Busia.

Q Do you know William Grant, the plaintiff?

A Yes.

Q Do you know Mr. Campbell, one of the defendants?

A Yes.

Q Do you know Mr. Tobin?

A Yes.

Q Do you know a man by the name of Roger Parenteau?

A Yes.

Q Do you know where Mr. Quigley's Red Top Lode Claim is?

A Yes.



Q And where Mr. Quigley's house is—where he lives?

A Yes.

Q Were you working for Mr. Quigley last summer in June or July 1921?

A Yes.

Q Did you see Mr. Campbell and Mr. Grant somewhere near Grant's tent some distance below the mouth of Quigley's tunnel one day there in June or July 1921 where some difficulty was had?

(Mr. Roth objects as irrelevant, incompetent, and immaterial. Court sustains objection. Mr. Stevens explains what he wishes to prove by this witness, and Mr. Roth withdraws his objection.)

Q Mr. Busia, state about what time it was as to the month or date that you saw this occurrence.

A I don't remember the month—just remember it was early in the morning before eight o'clock.

Q Had you had breakfast?

A No, not yet.

Q Just describe to the jury what you saw.

A I saw nothing—only saw Mr. Campbell run after Grant five or six steps and when Mr. Grant got to the tent, Mr. Campbell come back to the shaft hole.

Q After Campbell turned around and went to the shaft, he told Tobin to come on out of the hole?

A Don't say—I went back in the house.

Q How was Billy Grant traveling—running or walking?

A Where?

Q When Campbell was after him? Did he run?



A Yes, he run.

Q Into the tent?

A Yes.

Q Was Campbell running after him?

A Yes.

Q Was that all you saw?

A That was all I saw.

MR. ROTH: Campbell run five or six steps?

A Not over six.

MR. STEVENS:

Q You were subpoenaed, were you not, by the defendants in this case?

A Yes sir.

(Mr. Roth makes objection and objection is sustained.)

MR. STEVENS: That is all.

MR. ROTH: That is all.

O. M. GRANT, called as witness for the plaintiff, being duly sworn testified:

### **Direct Examination**

BY. MR. STEVENS:

Q You may state your name.

A O. M. Grant.

Q Do you know the plaintiff in this case, William Grant?

A Yes sir.

Q Are you any relation to him?

A None whatever.

Q Have you known Mr. William Grant for some time?

A I have.

Q How long—about?

A About four or five years.

Q Are you the same Grant that is sometimes called among the boys and acquaintances "Red Grant"?

A Yes sir.

Q You are sometimes referred to as "Red Grant"?

A By a certain element.

Q Do you know Mr. Campbell, one of the defendants?

A Yes sir.

Q Do you know Mr. Tobin?

A I do, yes.

Q Are you acquainted with the ground that is covered by what is known as the Hillside Placer Location, situated above and northeasterly and adjoining the Horseshoe Mining Claim on the right limit of Moose Creek and the left limit of Friday Creek?

A Yes sir.

Q Did you perform any assessment work or annual labor for the year 1920?

A Yes sir.

Q And at what time did you perform such labor?

A On the 3rd day of Novembr 1920.

Q Did you commence about the 3rd day of November?

A I commenced on that day, yes sir.

Q I ask you to examine Defendants' Exhibit "1" and state what that is, if you know.

A That is the affidavit of labor that I performed

Q The writing is signed "O. M. Grant". Is that your signature?

A That is my signature.

Q Did you swear to that before the officer—the commissioner of the Kantishna Precinct?

A Yes sir.

Q His name who swore you is not on there. How about it?

A I don't know anything about it. I swore and left it with him.

Q For what purpose?

A For to put on record.

Q You turned it over—it was filed at the request of T. P. Aitken?

A I don't know anything about that.

Q You didn't give the Commissioner any instructions about T. P. Aitken?

A No, I did not.

Q But when you swore to it you left it there for Billy Grant to pay the recording fee and have it recorded? You didn't pay the recording fee?

A No, sir, I didn't.

Q Are you able to state how many days labor you performed on that placer claim?

A Yes sir.

Q How many?

A Twelve and one-half days.

Q What work did you do?

A I sunk nine holes.

Q What was it reasonably worth—the labor you performed, According to current wages?

A According to current wages, I got \$1.00 an

hour for what I worked.

Q Was that a reasonable value of labor at that time?

A Yes—I boarded myself.

Q Who paid you?

A Billy Grant.

Q How much?

A \$100.00.

Q About what time did you get through?

A On the 16th of November.

Q 1921?

A 1920.

Q Do you know about the location of where you did that work?

A Yes.

Q I will ask you to look at plat marked "Plaintiff's Exhibit A." Do you know where the stakes are located of the placer claim?

A Yes.

Q Have you been down at the initial post or stake?

A Yes, I have.

Q Were you present when this survey was made by Mr. Friedrich?

A Yes.

Q During the entire time, were you?

A Not all.

Q Do you know where the initial stake is?

A Yes sir.

Q In the lower left hand corner of this map?

A Yes sir.

Q What is designated on the map as corner No. 2

—the lower right hand corner of the map. Were you ever there?

A Yes, the lower line.

Q Have you seen that stake?

A Saw it when I done assessment.

Q Going toward the top of the map from there is corner post No. 3. Have you seen that stake?

A No, I didn't go up.

Q Have you at any time since?

A No.

Q Then you weren't with Mr. Friedrich when he surveyed from that stake?

A No sir.

Q Going towards the upper left hand corner of the map, marked corner post No. 4. Have you been up there.

A Yes.

Q When were you first there?

A I was there on the 3rd when I started the assessment work.

Q November 1920?

A Yes.

Q When you went there November 3, 1920 did you know of the location and existence of what is known as Quigley's discovery shaft?

A Yes sir.

Q That shaft had been put down prior to that time, had it?

A Yes sir.

Q Do you know whether or not Quigley had started his tunnel at that time?

A There was no tunnel then.



Q Where the mouth of the tunnel now is?

A Yes.

Q Was there anything in that vicinity?

A A hole, yes.

Q Do you know how deep the hole was?

A I should judge about 8 ft.—7 ft. or 8 ft.

Q Were you down in the hole?

A No, just looking down.

Q You didn't know of any discovery in that hole at that time?

A Yes, there was some rock laying out there—some vein matter.

Q State approximately how far that was above—that is, up hill from the lower center end stake of Quigley's Red Top Quartz Claim.

A I couldn't exactly swear to it.

Q Was it between 100 ft. and 150 ft.?

A I should judge 150 ft.—less or more.

Q It is indicated on the map 173 ft. Do you think it would be somewheres near that?

A Yes.

Q When you went on the ground—the placer ground—on November 3, 1920, who went with you?

A Billy Grant.

Q Billy Grant, the plaintiff?

A Yes sir.

Q Did you at that time see what purported to be Quigley's center end stake on the lower end of Quigley's claim?

A Yes sir.

Q Did you at that time see either or both of the

corner stakes—the lower corner stakes of his end line?

A Yes sir.

Q Both of them?

A Yes sir.

Q What did you and Billy Grant do, if anything, with regard to finding a place to do this assessment?

A Billy looked around and I asked him where to go to work, and he examined and looked around and said, "Anywhere here—about 25 ft. from the line—make a hole." He went back up again and I think stepped the ground and I sank right here. (Indicating)

Q Did he use anything to measure with?

A No, I don't think so.

Q You used a shovel to measure with afterwards, didn't you?

A Yes, 25 ft. I measured down from the center end post.

Q You measured from the center end post of Quigley's straight down hill?

A No, I went 25 ft. straight down and about 7 ft. or 6 ft. up stream from the strike of the post.

Q By the 'strike of the post' you mean straight down?

A Yes.

Q You went about 6 ft.?

A 6 ft. or 7 ft.

Q Towards the up stream from Moose?

A Yes.

Q Why did you do that?

A He lined up the ledge.

Q Who?

A Billy Grant and I.

Q Did you figure the ledge dipped towards the up stream?

A He looked up at Quigley's holes—up where they were sunk—and he said about here would be in line with the ledge if it runs through here, and he said to sink on that.

Q State any and all things you and Billy spoke of with reference to where you wanted to do the work.

A After he had measured down and agreed where to sink the first hole, he says, "Sink about here, and if you find any float or indications of quartz, tell me, and try and get to bed rock and the lead of Quigley's. You may get some placer too." He said, "A little below is where I made my discovery. Sink around and you may get something if you get to bedrock." That was the substance of our talk.

Q That was the substance of about all of your talk?

A Yes sir.

Q Did you have any arrangements with Billy Grant as to what might happen in the event you should strike a quartz lead?

A None whatever. He just told me to let him know and I said yes I would.

Q You were not sinking there to find a vein that you hoped to have any interest in?

(Mr. Roth objects to question as leading and suggestive. Objection over-ruled.)

A No sir.

Q Mr. Grant, I wish you would examine the map and state to the jury, if you can, what hole it was you first put down.

A (After examining map) This hole right here. (Indicating)

Q What is that indicated as—what is it called on the map?

A Campbell and Tobin shaft.

Q Is that the hole you put down first?

A Yes sir, that one right there.

Q How deep did you put that hole down before you left it?

A 12 ft.

Q Was that the hole that you started when you started to work there about November 3rd?

A Yes sir.

Q Look just to the right of that—there is a place marked a “hole”.

A Yes.

Q Did you start that hole or dig that hole?

A No sir.

Q Did you have anything to do with that hole?

A No sir, nothing whatever.

Q Have you seen that hole since it was dug?

A Yes sir.

Q When did you first see that hole?

A I saw it first on the 3rd day of June.

Q What year?

A 1921.

Q What was the appearance of the hole to the right at the time you first saw it?

A It looked as if it was newly dug.

Q In June 1921?

A Yes sir.

Q At that time what did you observe, if anything, with reference to the shaft indicated 'Campbell and Tobin shaft'?

A I saw Campbell on a windlass.

Q You saw Campbell working a windlass?

A Yes.

Q Do you know whether any one was down in the hole?

A I didn't see him, but 'hollered' down to Tobin and he answered.

Q Do you know about the time in June?

A It was the 3rd day of June.

Q State whether or not you recognized that hole at that time as being the hole you dug 12 ft. deep.

A Yes sir.

Q You said you dug nine holes altogether?

A Yes.

Q Examine the holes that are indicated and count them, and after doing so, you may state whether or not they are indicated approximately in the proper places on the map.

A (Examines map) Yes sir, they are in place.

Q There is a place there designated as "cabin."

A Yes sir.

Q What was at that place, if you know, or if anything, when you went there in November 1920?

A There wasn't anything there.

Q Was there anything there in June 1921 when you were there?



A Yes.

Q What was there then?

A No, there was nothing there then—only a tent.

Q Was there a tent there then?

A No, there was nothing.

Q Did you afterwards see a tent there?

A I couldn't be sure when I went there in June whether there was a tent. I think there was.

Q You were there after the 3rd of June, were you, and there was a tent there then?

A Yes. Wouldn't be quite sure whether there was a tent there or not.

Q Are you able to state whether this place here where the cabin is now located—is that approximately the same place that the tent was located?

A No, the tent was located further up hill.

Q About how much further up?

A About 35 ft. or 40 ft.

Q In June—the 3rd day of June 1921—when you say you examined this hole to the right, or upstream from what is indicated as Campbell and Tobin's shaft, you said it appeared to you to be a fresh hole?

A Yes.

Q Did you at that time examine any of the other holes you had dug the November before?

A No, I didn't go near them.

Q Are you a miner by occupation?

A Miner and prospector.

Q How long have you been mining and prospecting?

A About twenty five years.

Q How long have you been in Alaska?

A About twelve years.

Q And have you been engaged in prospecting and mining ever since you have been in Alaska?

A Most all the time.

Q What has been your experience in mining—has it been regarding placer or quartz locations?

A Mostly quartz.

Q Do you own any claims of your own?

A Yes sir.

Q Quartz claims?

A Yes sir.

Q In the Kantishna country?

A Kantishna District.

Q You sank other holes than these we have been talking about?

A Yes.

Q Have you had experience as a laborer in placer mines to any considerable extent?

A Yes sir.

Q You have dug a good many holes in the country?

A Yes sir.

Q You state I believe that first hole you sunk there, which you have an idea as being the same as Campbell and Tobin's shaft—why didn't you sink it further down than 12 ft.?

A It was as far as one man can throw—couldn't throw any more easily.

Q It was as far as one man could put it?

A Yes.

Q Did you have any windlass?

A No.

Q State whether or not you had any one to help you.

A No, I tried to get my partner—Billy told me to get him, but he was sheep hunting. He told me to get some one else, but I told him I didn't know of anybody.

Q Were you on the watch for some one?

A I knew all the men—some were working and some were out hunting—knewed everybody in camp.

Q After you sunk the first hole, did you sink the balance of eight holes before you left the job?

A Yes, he told me to go on and try others, and sink that hole later as he wanted to put a windlass on and get a man to go on and try to get to bed rock. He said the rest might be shallower and to look around and see if I could get to bed rock. I dug the rest all around, attempting and trying to get to bed rock.

Q Did you know of any, or see any evidence of vein or lode or rock in place within the boundaries of this placer claim at that time?

A No sir.

Q Did you know of any lode or vein within the boundaries of this placer claim at any time prior to the discovery of Campbell and Tobin in this shaft that you started?

A Nothing but Quigley's up on the hill.

Q I am asking you if you knew of any vein within the boundaries of William Grant's placer claim?

A No.

Q You don't know now whether the vein that

Campbell and Tobin discovered is the same vein that Quigley discovered or not, do you?

(Mr. Roth objects to question as leading and suggestive. Objection over-ruled. Exception taken and allowed.)

Q Do you know—can you tell—I asked if you knew whether or not the vein or lode that Campbell and Tobin discovered—whether that is the same vein that Quigley discovered?

A I don't know—I couldn't tell.

Q It has never been connected so far as you know?

A Not that I know.

Q Do you know how far the vein runs down hill from the place where Campbell and Tobin discovered it?

A How far down hill from where?

Q From Tobin and Campbell's discovery. I asked if you know how far it runs.

A No, not from his hole down.

Q As a mining man, I will ask you whether or not it is possible for any one to tell—any miner to tell, how far a vein will run without being demonstrated—without being opened up?

A It is impossible.

Session 10:00 A. M. February 4, 1922.

ALOIS FRIEDRICH, re-called by defendant for further cross-examination, being heretofore duly sworn testified:

BY MR. ROTH:

Q Mr. Friedrich, you stated that you placed this



point marked corner No. 5 at your own suggestion without instructions.

A I did.

Q You measured from what is marked corner No. 1 post, 660 ft. up to that point and set that stake?

A Yes sir.

Q You at that time were aware of Quigley's working up there?

A Yes sir.

Q Why did you not commence at corner No. 4 as marked on the plat, and mark 660 ft. or run the line off there and exclude Quigley's workings?

(Mr. Stevens objects to question as immaterial, and Court agrees.)

Q If you had commenced at corner No. 4 and marked 660 ft., and then connected that line with corner post No. 2, it would have left the claim the same size as it is now—that is, as you have it—wouldn't it?

(Mr. Stevens objects to question as immaterial. Objection over-ruled. Exception taken and allowed.)

Q If you had commenced at corner No. 4, as marked on the plat, and marked 660 ft., and set the point such as you have set at corner No. 5—set a point there, and then connected that with corner No. 2, wouldn't it have left the same area that is in this claim with the line marked from corner No. 5 to corner No. 3?

A It would not.

Q Why wouldn't it?

A Because one line is longer.



Q Which line is longer?

A From initial post to post No. 2 is 1400 ft. 8 inches, while the upper line is 1300 ft.

Q Were you aware at the time that you set that arbitrary line there that in no event under our law can a placer claim be more than 1320 ft. in length?

(Mr. Stevens objects as improper cross-examination. Objection sustained)

Q Why did you not, when you undertook to draw an arbitrary line of your own accord—why did you not take a line over on the easterly side and from there throw out the excess acreage?

(Mr. Stevens objects as improper cross-examination, also immaterial. Objection over-ruled. Exception taken and allowed.)

Q While you were trying to get the excess acreage out of the claim, why didn't you throw it out of the easterly end?

A For the simple reason that this is a much longer line—it is 136 ft. too long, and the other line is nearly 80 ft. too long.

Q You have this marked 1400 ft. You left that excess in?

A Yes.

Q Isn't it true that it was because you were trying the best you could to make measurements to get this known lode out of that placer claim?

(Mr. Stevens objects to question as assuming there was a known lode. Objection sustained.)

Q Do you say before that you didn't take your

instrument down off of this Hillside Bench Claim to the southerly?

A No, only to those corners.

Q Didn't you stake a line on down below?

A No lines whatever down below.

Q If a line was staked, you had nothing to do with it?

A I had nothing to do with it.

Q Take the northerly end of this lode claim—this Hillside Lode Claim of William Grant's—do you know where the center end stake of that Hillside Lode Claim of William Grant's was with reference to the end line of Quigley's claim?

A No sir—I would have to guess.

Q I am not talking about measurements. Was it on that line—did you take a site across from Quigley's southwest corner stake and Quigley's southeast corner stake?

A I took site, yes.

Q Where did Billy Grant's lode center upper stake come with reference to that line?

A I don't think the instrument intercepted it.

Q Which way was it?

A I think southwest, properly speaking.

Q How far?

A That I couldn't say—I couldn't intercept it with the line.

Q Take his northwesterly corner stake of this lode claim—where was it with reference to the line you sited?

A All three of those stakes are off that line slightly.

Q I know that, but I am asking which side was the northeast corner stake of the Hillside quartz claim.

A I couldn't say, I know it was off the line, but I couldn't swear whether it was to the north or south

Q Wasn't it to the north?

A I couldn't say positively, but think it was north.

Q And the other, northwest, was to the south?

A They were both off the line.

Q Wasn't the northwest off to the south a little?

A I know it wasn't square with the line.

Q In other words, did your line cross that line of Quigley's from the northeast to the southwest just a—by a small angle?

A I know it was off square, but I don't remember whether the angle was north or whether it ran in the opposite direction.

Q You know one of those stakes is north and the other south, but you don't know which one?

A I don't know which one.

MR. ROTH: That is all.

MR. STEVENS: That is all.

O. M. GRANT, re-called as witness for the Plaintiff, being heretofore duly sworn, testified:

**Direct Examination, (continued.)**

BY MR. STEVENS:

Q I will ask you as a mining man to state whether it is possible for any one to tell how deep—how far down a vein or lode will go without its being opened up or demonstrated?

A You can't do it.

Q State as a mining man whether or not there is any rule to go by or whether anyone can tell whether a vein will get richer as it goes down, or poorer, or whether it remains the same. Do you know or not that it can be demonstrated or can be told any way except by actual demonstration?

(Mr. Roth objects to question as immaterial, irrelevant and incompetent. Objection over-ruled. Exception taken and allowed.)

A I have no knowledge of it. I don't think any body can tell.

Q As I understand, you have had several years experience in mining in Alaska?

A I have been working at it, yes sir.

Q Mining and prospecting?

A Yes sir.

Q Do you know what the general theory among miners is as to where the placer gold comes from in this country?

A From the lode.—(Interrupted)

(Mr. Roth objects on the ground of being immaterial, irrelevant and incompetent. Objection over-ruled.)

A —The theory as far as I know is that it comes from lodes and veins in free milling.

Q You mean placer comes from quartz veins?

A Yes sir.

Q How does it come? What is the theory of how it comes from the veins?

A The theory as far as I know is by erosion and grinding down hills, separating rock—separating free milling from the lode.



Q If there is any vein or lode existing in a certain territory which is up hill from a piece of placer ground and within the same vicinity, is there any custom between placer miners that you know of in this country as to where would be the best place to prospect or sink holes to find pay streaks of placer?

A Under those quartz ledges is where I like to prospect for placer.

Q What do you mean by 'under'?

A On the down-hill side or lower level, or lower benches from where the vein is situated.

Q You mean to go down hill?

A Yes sir, right below the ledge.

Q You are familiar with this placer ground of William Grant, the Hill Bench Claim. Knowing, as you did, that Quigley had made a discovery at a higher elevation up hill from the placer claim, you may state, regardless of any hope of finding the ledge, you may state where, in your judgment, would be the the best place to prospect for placer on that placer claim at the time you and Grant went there in November 1920.

(Mr. Roth objects as irrelevant, incompetent and immaterial. Objection over-ruled.)

A Under that quartz claim.

Q Where would that be?

A That would be under the strike of the vein as near as I could get—along here. (Indicating)

Q Would that be down where hole No. 1 was?

A Yes sir.

Q When you say 'under the vein' you mean down hill from the vein?



A That is what I mean—on a lower level from the vein.

Q That would be the place to prospect for placer, regardless of the hope of finding the vein?

A That is where I like to prospect.

Q When you were doing assessment work on the plaintiff's placer claim, the Hillside Placer Claim, in November 1920, did you see the defendant Campbell around there?

A Yes sir.

Q Did Campbell see you digging those holes?

A He passed by on the road at the time and he seen me at it.

Q Did you have any conversation with Campbell during the time you were digging holes, at any place near this placer claim?

A Yes sir.

Q You may state where the conversation occurred.

A It took place down in Bartlett's tent.

Q How far is that from the placer claim?

A It might be 600 ft.—maybe more or less.

Q In that same vicinity?

A Yes sir.

Q Was that in the month of November 1920 while you were digging holes?

A Yes sir.

Q What, if anything, did Campbell say regarding the placer claim or your work?

A I was down at the tent eating lunch at the noon hour. Mr. Campbell was there with a load of meat with Billy Grant's horses, going up to the mine.

Q Which mine?

A Aitken's mine. And he says, "What are you doing down here?"

Q Campbell said to you?

A Yes. I said, "Why, I am eating lunch," and he says, "you better be up doing assessment work or I will jump that claim of yours." I guess that was all the conversation.

Q Do you know what claim he referred to?

A It must have been around about the 8th, 9th or 10th of the month.

Q Do you know what claim he referred to?

A It was this claim—the one I was doing assessment work on—Billy Grant's. That is what I was working on.

Q Had he seen you working on the claim there before this conversation?

A He must have. There was another occasion before that when I helped him put a tent up—think that would be about the 6th or 7th of November 1920. He asked me if I wouldn't give him a hand to stretch the tent, and I said, "Yes, I will at noon."

Q What else?

A I said, "Yes, I will at noon if you are ready to help fix it up." The wind was blowing so you couldn't hold it down, so when I came down at noon he was almost ready and I helped him put it up and take it down, so he also knew I was coming from representing on that claim and knew I was working up there.

Q Were you on this placer ground before you went there to do assessment work?

A I walked across it.

Q You have been there several times since?

A I have been there about two or three times.

Q And how long about have you lived and worked and been around in the vicinity of the claim?

A I have been in that vicinity around and prospecting since—continuously about a year and a half. The first time I went down I didn't do much—not until spring.

Q Do you know of any prospecting work or finds in placer ground near there?

A There has been some prospects—some stringers found—little prospects.

MR. ROTH: Stringers in placer?

A Oh yes, though not anything much—I have been prospecting in both.

MR. STEVENS:

Q Do you know of any prospecting or discoveries or mining that has been going on in that vicinity in placer?

A No, I don't know of any discoveries in placer.

Q Any place in that country?

A Not around there—new discoveries I mean

Q I didn't ask for new discoveries—has anyone ever done any placer mining?

A Yes.

Q Where?

A On Friday Creek and Eureka.

Q How near is the west end of Billy Grant's placer claim down to Friday Creek?

A It might be 300 ft. more or less.

Q It is in that vicinity?

A In that vicinity.

Q Do you know whether or not Billy Grant's

placer adjoins on the westerly or northwesterly end to another placer claim?

A Yes sir.

Q And is that claim known as being on Friday Creek?

A Yes.

Q Do you know what claim that is?

A I think it is Pete Leach's. I don't know the name of it.

Q Do you know whether it is recent or old?

A I don't know that.

Q Do you know whether the mine was any good?

A Yes, I have heard say so, although I wouldn't say—it was talk around the mine.

Q Recent or years ago?

A Years ago.

Q Do you know whether or not they have ever taken out any pay gold as a matter of reputation?

A Yes, I have heard they had pay, that is, it is supposed they have had pay on Friday; in fact, I worked on it since I was there.

Q And on Moose Creek near Grant's placer claim—have they been doing any work on any of the placers?

A TenEych has been representing.

Q Dr. Sutherland has been down in that vicinity getting ready to do hydraulic work, has he not?

A Yes sir.

Q What claim, if you know?

A It is a group of claims—I don't know the numbers—opposite Eureka, the mouth of Eureka, where he is opening up.

Q How far is that, about, from this placer claim of Grant's.

A About one mile.

Q It is on the same creek?

A Yes, on the same creek—Moose Creek.

Q From your knowledge of this placer claim of Mr. Grant's—the Hillside Placer Claim—were there any known veins or lodes prior to the time Campbell and Tobin made a discovery in the hole indicated on the map as being the Campbell and Tobin shaft?

A No sir.

Q Are there any other known veins or lodes on—is there any other known vein or lode within the boundaries of the Hillside Placer Claim at this time, except the discovery of Campbell and Tobin in June 1921?

A There are not.

Q I believe you already stated you didn't reach bed rock in any of the holes you sunk in November 1920?

A 1920?

Q You didn't reach bed-rock in any of them?

A No sir.

Q Up to that time had bedrock ever been reached on this placer claim so far as you know?

A No sir, not as far as I know.

Q Do you know J. B. Quigley that made the discovery above?

A Yes sir.

Q Owner of the Red Top Claim?

A Yes sir, I believe that is the name.

Q Was Mr. Quigley down around that placer



where you did assessment work for the Hillside Placer Claim in November 1920?

A Yes sir.

Q How many times was Quigley there?

A He was there a couple of times that I know of.

Q Did he see you digging holes there and doing assessment work?

A Yes sir, he talked to me and came down to see me about business.

Q While you were digging holes?

A Yes.

Q Were you ever in Quigley's tunnel?

A Yes sir, I have been in there.

Q Before Campbell and Tobin came on the placer ground in June 1921?

A Yes.

Q What time were you in the tunnel—not the exact date—just about?

A Have been in there two or three times—had been in Quigley's tunnel the day that they were on the ground on the 3rd of June 1921—was the last time I was in.

Q How far in were you?

A About 150 ft. anyway—couldn't tell exactly.

Q You say you was on the ground there in that vicinity when Campbell and Tobin were doing work here on the placer claim of Grant's?

A When they were working in that hole.

Q What did you observe, if anything, in regard to Campbell and Tobin working?

(Mr. Stevens makes objection and same is over-ruled.)

Q Did you have any talk with Tobin or with Campbell at that time?

A Nothing more than just 'hollared' down to Tobin—I thought he was in the hole—I heard his voice—and he 'hollared' up to me.

Q Was there anything said in regard to this claim?

A No—just bidding the time of day.

Q Did you at that time recognize the hole that Tobin was in as being the same hole you had sunk down 12 ft. in November 1920?

A Yes sir.

MR. STEVENS: You may take the witness.

### **Cross-Examination**

BY. MR. ROTH:

Q Mr. Grant, you say that in the month of November 1920 when you were doing assessment work there under the direction of William Grant that you couldn't get any one to help you to bed-rock a hole there?

A Yes sir, I said so.

Q How long did that state of affairs last—I mean the condition of labor there?

A How long did it last in waiting to get a man?

Q How soon after that could you have gotten men?

A I don't know.

Q Could you in the month of December 1920?

A I don't know.

Q Well, you knew conditions exactly in Novem-

ber. When did your knowledge on that subject cease?

(Mr. Stevens objects as improper cross-examination, as he got through with assessment work on the 16th of November. Objection over-ruled.)

Q You understand, don't you, Mr. Grant, that between the time you did the assessment work and completed the assessment work on the 16th day of November 1920, and the first day of May 1921 there was no attempt made by any one, as far as you know, to make a location on the Quigley extension lode?

(Mr. Stevens objects as not proper cross-examination, assuming this particular property is an extension of the Quigley lode, which does not appear. Mr. Roth agrees to withdraw question and put it a different way.)

Q What was the labor condition there in the month of December 1920?

(Mr. Stevens objects as immaterial, incompetent and irrelevant. Objection over-ruled. Exception taken and allowed.)

Q Did you say you tried to get your partner to help you but he was gone at that time?

A I didn't say I tried. I told Mr. Grant that my partner was not home and I couldn't get him.

Q While you were there doing this work, did you have an occasion to go to Joe Dalton's cabin?

A Not that I remember.

Q You are acquainted with Joe Dalton?

A Yes sir.

Q You know where his cabin is at the mouth of Eureka Creek?

A Yes sir.

Q Do you remember while doing work there of having a conversation with Joe Dalton in his cabin on Eureka Creek?

A I do not.

Q On or about the 9th or 10th day of November 1920 in the cabin of Joe Dalton near the mouth of Eureka Creek, in the Kantishna Recording Precinct, yourself and Joe Dalton alone being present, did not Joe Dalton ask you why you did not bottom one of those holes on the Hill Bench and pick up Quigley's lead, and did you not reply that you suggested to Billy Grant to put a windlass on and bottom it and you could get your partner, Frank Giles to help you and you would pick up that lead, and that Billy Grant said, "To hell with it, you might have to go 100 ft." and that he was not holding it for mining purposes—that he was holding it for Aitken for a warehouse site?

A I had no such conversation or don't remember of being in his house any time those days—conversation never occurred with me.

Q You say that Billy Grant paid you for your work there doing that assessment work?

A Billy Grant handed me my check.

Q Wasn't it Tom Aitken's check?

A It was on Tom Aitken. yes sir.

Q Wasn't it signed "Tom Aitken, by Wm. Grant?"

A Yes sir.

Q Now you say you were at this hole that Camp

bell and Tobin were working at on the 3rd day of November 1920?

A Not on the 3rd day of November.

Q I mean on the 3rd of June.

A Yes sir.

Q When you were there at that time, did you see a hole about 12 ft. to the easterly of the Campbell and Tobin discovery shaft?

A Yes sir.

Q What was the condition of that hole at that time?

A That hole was about between 5 ft., 6 ft., or 7 ft. deep and looked to be a fresh dug hole.

Q What was the size of that hole at the surface of the ground?

A At the surface it would be about 7 ft. long and 4½ to 5 ft. wide—the sod was cut further than where the hole started.

Q There was no sloughing?

A Yes sir, sloughing and a little water.

Q There was sloughing in it?

A Yes sir.

Q It looked like a perfectly fresh hole?

A Yes sir.

Q How deep?

A I should judge between 6 ft. and 7 ft.

Q How much water was in it?

A About half a bucket in one corner.

Q And you now swear positively that the hole that Tobin and Campbell were working in on the 3rd day of June 1921 is the same hole that you first sunk when you went on there on the 3rd day of



November before that?

A I do.

Q Now what makes you so sure about that?

A Because I know I dug that hole.

Q I ask you why you are so positively certain that this is the hole that you first started to sink?

A I am familiar with the location.

Q What makes you so positively sure that this is the same?

A We measured the hole when I started to sink it—we located it.

Q Who measured the hole?

A Billy and I—he instructed me where to sink.

Q Billy Grant measured it?

A He measured.

Q Didn't you measure?

A Yes sir.

Q Measured with a tape?

A No, with a shovel handle.

Q Didn't you measure with a shovel handle?

A Yes sir.

Q Did Billy Grant measure with a shovel?

A Yes.

Q Didn't you testify that Billy Grant didn't, but you did?

A I remember I believe I did.

Q Weren't you informed after you got off the stand—didn't Billy Grant inform you?

A No sir.

Q Nobody told you that? You swear positively nobody told you that?

A I do.

Q You, without anybody suggesting anything to you, on thinking the matter over, remembered that Billy Grant measured?

A Yes, I remember that we were both there.

Q And without anybody suggesting to you, you just corrected that in your mind?

A Yes sir.

Q Nobody suggested that you made a mistake in your testimony?

A No sir.

(Mr. Stevens enters objection but as witness had already answered, no action was taken)

Q Just how did Billy line up that ledge?

A He stood and looked up hill and lined with the holes of Quigley and said just sink there. We talked it over and thought it would be the strike of the ledge if it come through there.

Q And that is what prompted you to sink there, because he measured up with the strike of Quigley's ledge?

A The reason we wanted to sink there was if we went down and got to bedrock, it was all right.

Q The reason why you did that was on account of the strike of that ledge?

A Yes, I guess it was.

Q What else did he say to you there?

MR. STEVENS: Who?

MR. ROTH: Billy Grant.

Q He told you here about the place, and what else did he say?

A We talked about things in general—I don't remember anything further than that.

Q With reference to your instructions?

A He told me, "If you strike anything—locate the ledge—you tell me."

Q Is that all?

A Yes sir.

Q That was all he told you?

A Yes, I said, "Allright, I will tell you."

Q Were there any conditions on which you should go to bed-rock?

A No sir. He thought I would get bed-rock in a short distance.

Q How deep?

A He didn't say exactly.

Q He didn't say if you found good indications you should go on to bed-rock?

A No sir.

Q You are sure of that?

A I am. We didn't talk about it—didn't know when we would strike bed-rock.

Q Did he say how deep to go?

A No.

Q Did he say anything about a windlass there?

A No.

Q Did he say anything about getting your brother?

A My brother?

Q I mean your partner.

A No, not at that time.

Q When did he say that?

A After I had the hole as far as I could get it.

Q Didn't he say to you right at the time when

he selected the place, "If you find float, I want you to go on to bed-rock?"

A No sir.

Q I didn't get that right yesterday?

A He said after that—if I could get a man— (Interrupted)

Q Yesterday didn't you testify that when he selected the place before you started work, he told you if you found float he wanted you to go on to bed-rock?

A No.

Q That first hole you put down 12 ft. I understand?

A Yes sir.

Q Now when you got that hole down 12 ft. what did he say to you—what instructions did he give you about that hole?

A He didn't give me any instructions—only tried to get a man to go down further.

Q Did he say he would sink that hole later?

A Yes sir.

Q You said there were no men in camp?

A Yes sir.

MR. STEVENS: He didn't say there were no men in camp.

MR. ROTH: No men in camp to be hired. That is what I am talking about.

Q I understood you to say it was the custom of placer miners in this country to prospect under a lode?

A I said so, yes sir.

Q That is the first thing that a placer prospect-

or does is to go out and find a lode and prospect under that lode?

A If there is a lode, that is the theory to prospect under it, and that is what I generally try to get—on a lode throwing free milling ore.

Q I understood you to say it was the custom of placer miners in this country to prospect under a quartz lode?

A Yes sir.

Q That is the custom?

A Lots of them do it, yes—when they know it is there—if they know a ledge is throwing free milling gold—they generally do it, if they know where to go. They don't always know where to go.

Q That is where the principal placer claims in this country have been discovered?

A The very rich placer claims is under lodes.

Q How is this Hill Bench Placer located with reference to elevation as to Moose Creek?

A How do you mean—from the drop of the creek or side of the hill?

Q I am talking about the elevation of the placer claim as compared with the elevation of Moose Creek just below—just under it.

A You mean how much raise in the benches there?

Q Yes, what is the difference in elevation between this claim and the waters of Moose Creek?

A I never measured it—I couldn't tell.

Q This claim is up on the side of the hill?



A Yes sir—not on the side—partly on the side of the hill.

Q Every one of the holes is on the side of the hill?

A Partly, yes.

Q Isn't every one?

A Just on the slope of the side hill.

Q You didn't sink any holes on the bench?

A No.

Q There is some bench ground on the claim?

A Yes, below.

Q You didn't sink any holes there, did you?

A No sir.

Q Over here on the—take the easterly half of this claim—how much of the easterly half is bench?

A I guess about one-half.

Q That is the down hill?

A About one-third anyway of that is pretty flat.

Q Of the down-hill part of it?

A Yes.

Q On the southerly side of it?

A Yes.

Q You think as a placer miner that a man would be more liable to find the placer gold in paying quantities on the side of a hill above the bench, if it is under a quartz lode, than he would on the flat bench below?

A It would be out of the ledge.

Q Where he would be liable to get good ledge?

A No, if it isn't too steep to go over—right on the decomposed ledge.

Q What kind of ore was that that Quigley had there?

A I understand that it was free milling ore and galena.

Q You understand that it was galena ore?

A Yes.

Q Did you understand there was any free milling ore in it?

A Yes sir, I was informed by Jim O'Brien—he panned it out.

Q Out of this ledge?

A Yes sir.

Q You understand, do you not, that that ledge has its value principally as galena ore?

A And some stringers through and in—Interrupted)

Q You mean Quigley's vein?

A Yes.

Q The reason why it is recognized as having value is on account of the galena?

A Galena and stringers through of decomposed free milling ore.

Q I say it is considered as having value on account of the galena?

A Yes sir.

Q That is what gives it high-grade quality?

A Yes, I guess—more silver and gold.

Q You don't understand there is free milling in any quantity?

A I understand there is 20 oz.

Q 20 oz. to the ton?

A I could state easily over 20—some people say

who are familiar with it—that is what they tell—have been telling that all the time, that it is rich in gold.

Q How high did you say this placer claim is above Friday Creek?

A Well. I couldn't swear to the elevation.

Q It is a very steep hill down to Friday Creek?

A No, a flat bench and then drops off 150 ft.

Q They are low hills on the southerly end?

A No, the southerly end is not very steep—it goes on a bench and drops off in Moose.

Q I am talking about Friday.

A From the southerly end over into Friday it drops off.

Q Steep?

A Not very steep—up on side of hill about 150 to 200 ft. I should judge—rough estimation.

Q Of an elevation?

A I think about 150 ft. elevation.

Q You spoke of a conversation with Campbell there. When was this?

A Some where around the 7th, 8th or 10th. It was in the middle of my assessment work.

Q You said he was driving Billy Grant's team?

A Yes.

Q Wasn't he driving Aitken's team?

A No.

Q He was working for Aitken.

A Yes, he was working for Aitken.

Q Wasn't it Aitken's team?

A I always understood it was Billy Grant's team.

Q You always understood that?

A I had occasion to think it was.

Q He told you that you better be doing assessment work on the claim or he would jump the claim?

A Yes.

Q Did you have a claim?

A I didn't have no claim.

Q Not at all?

A I had one claim on record.

Q Where was it?

A Up on Eldorado—that's all I had.

Q At the time you did this assessment work in the month of November 1920, what work had Quigley done on that lode at that time?

A Just some prospecting holes dug on it.

Q Where were the holes?

A Right up the ridge.

Q How far from where you started your first hole was the nearest hole that Quigley had sunk at that time?

A I guess from the line it would be 160 to 170 ft.

Q From what line?

A From the upper line it would be.

MR. STEVENS: What do you mean by upper line—Quigley's lower end line?

A 170 ft. from Quigley's lower end line—probably 200 ft. from where I was digging—Quigley had a hole about 200 ft.—it might be less or more.

BY MR. ROTH:

Q From where you were working?

A From where Quigley had his first hole up hill.

Q And then he had more holes than that up hill?

A I think he had three holes further up—it was

a hill—about 600 or 700 ft. up.

Q The first hole you saw there that Quigley had you said was about 200 ft. from where you were. Would that be on the southerly side of the line between what is marked post No. 4 and post No. 3 here (Indicating map)

A Right there (Indicating on map.)

Q Was it below this line—below the upper side line of the Hillside Bench at that time?

A Below the upper side line? What do you mean by upper side line—the up Moose or down Moose—which do you mean?

Q Which do you call side lines? I am talking about the Hillside Bench placer claim and the up hill side line of that claim as it was staked at that time when you did assessment work. Was this lower hole of Quigley's below that side line of that bench claim?

A Of that placer claim?

Q Yes, of that placer claim.

A Yes, I think it was.

Q You say you saw the northeasterly corner stake of that placer claim on the 3rd day of November 1920. Is that correct?

A The northeasterly? I saw corner No. 3 post, but can not say whether it was northeast or northwest.

Q You saw the northwesterly corner post of the placer claim on November 3rd, 1920?

A Yes, I did see that post.

Q What was written on it?

A "Hill Bench" was all I made off it—it was very dim—"Hill Bench"—I looked for—looked to



find out if it was a corner of the claim.

Q That was all you could make out?

A Yes.

Q Were you ever to the northeasterly corner stake of the placer claim?

A No, I never went up to it—I saw a post of some kind.

Q When?

A The same day I was looking the posts up—on the 3rd day of November.

Q Didn't you set the post up there for him?

A No, I was never up there in my life.

Q Did he ask you to go up and set the post for him?

A He did not.

Q In one of the conversations you had with William Campbell while you were working there when Mr. Campbell was driving a team, didn't you tell Mr. Campbell that Billy Grant asked you to go up and set northwest corner stake, and you said you did set it in a draw?

A No, I never had any such conversation with Mr. Campbell.

MR. ROTH: That is all.

### **Re-Direct Examination**

BY MR. STEVENS:

Q Mr. Roth asked if at the time you started to sink the first hole on the Hillside Bench Placer Claim in November 1920—he asked you if one of Quigley's holes was within or south of the upper

side line of the bench claim and you stated, yes you thought it was.

A Yes.

Q Did you not give that testimony referring to the line—the side line between corner No. 3 and corner post No. 4, as indicated on that map?

A Yes.

Q Do you know whether such a hole as you referred to could be as much as 96 ft. below that line—or was it, or was it not, if you know, below the line indicated on the map between corner post No. 3 and what is indicated as post No. 5?

A It is above that line.

Q Had Mr. Quigley at that time located his Red Top Claim?

A When I saw it, yes.

Q When you state that at the time you sited up there this hole was below or inside of the Hill Bench Placer Claim—do you wish to qualify by saying it was within the boundaries of Quigley's Red Top Quartz Claim?

(Mr. Roth objects as irrelevant, incompetent and immaterial. Objection over-ruled)

A Yes sir.

Q That is, that Quigley's hole you refer to was at that time within the boundaries of the Red Top Quartz Claim?

A Yes sir.

Q You stated that when you received this \$100.00 for doing assessment work from Billy Grant you received a check with Tom Aitken's name signed to the check?

A I did.

Q Do you know who wrote the check and signed Aitken's name?

A Billy Grant.

Q Was Billy Grant superintendent, or working for Tom Aitken?

A Yes sir.

Q Do you know whether or not it was Billy Grant's custom at that time to draw checks and sign Tom Aitken's name to it?

A Yes sir.

Q Mr. Roth asked you about whether or not a certain conversation was had between you and Dalton in Dalton's cabin. Was there a conversation between you and Dalton in Dalton's garden near this cabin?

A Yes sir—some distance away.

Dalton which occurred near the cabin in the garden?

Q Some conversation was had between you and (Mr. Roth objects as irrelevant, incompetent and immaterial. Objection sustained.)

MR. STEVENS: That is all.

MR. ROTH: That is all.

DAN SUTHERLAND, called as witness for the plaintiff, being duly sworn, testified:

**Direct Examination:**

BY MR. STEVENS:

Q State your name.

A Dan W. Sutherland.

Q Where do you reside?

A In the Kantishna.

Q Kantishna Precinct, Alaska?

A Yes sir.

Q How long have you lived there?

A About six years.

Q Had you lived in Alaska prior to that six years?

A Yes sir.

Q How long have you been in Alaska?

A Since 1907.

Q During the time you have been in Alaska what has been your business?

A Mining Principally.

Q And prospecting?

A Yes.

Q Have you had any experience as prospector or miner in placer mines?

A Yes.

Q Have you also had experience in quartz mining or prospecting?

A Some.

Q In the Kantishna country?

A Yes, and outside.

Q Do you know William Grant, the plaintiff in this case?

A Yes.

Q Do you know Mr. Campbell, one of the defendants?

A Yes.

Q Do you know Mr. Tobin?

A Yes.

Q Do you know the property in dispute, known as the Hillside placer location on the right limit of

Moose Creek and the left limit of Friday Creek in the Kantishna Precinct?

A Yes, I know of it.

Q Were you ever on the property?

A Yes.

Q Did you ever see O. M. Grant on the property—you know O. M. Grant?

A Yes. No, I never saw him on the property.

Q Did you ever go on the property with the plaintiff, William Grant?

A Yes sir.

Q About what time?

A That was around the first part of November.

Q What year?

A 1920.

Q And where did you go with reference to the placer claim?

A Down through the claim—over the claim—across the claim.

Q Did you at that time know approximately the location of a discovery shaft known as Quigley's discovery, up hill from that claim?

A Yes, I knew of some holes Quigley had above there.

Q Did you know any of the lines of Quigley's quartz location at that time?

A No, only just in a general way—knew it run up the ridge.

Q Did you see any hole or holes that had been dug there on the placer claim?

A Yes.

Q How many?



A One.

Q And how deep was it, about, if you know?

A Well, I imagine 8 ft.

Q Did you go to that hole with Mr. William Grant?

A Yes sir.

Q Do you know anything about how far the hole was from Quigley's center end stake—lower center end stake?

A No, I don't.

Q Did you see at that time, or about that time—did you see any of Quigley's lower stakes?

A No.

Q Then you don't know just where this hole was with reference to Quigley's lower end line?

A No, I couldn't say.

Q Was that one hole all the holes you saw on the placer claim?

A Yes, that was the only hole that I seen at that time.

Q Did you ever see any other holes after that time on the placer claim?

A No, have never been on that ground until late in the winter and there was quite a bit of snow then.

Q The winter of 1920?

A The following spring.

Q Spring of 1921?

A Yes.

Q You were over the ground then?

A I made a trip to the mine.

Q Did you ever examine any stakes of the

placer claim?

A No sir.

Q Did you ever make any particular examination of the surface of the ground covered by the placer location?

A No.

Q Did you see the ground at any time when Campbell and Tobin were there?

A No.

Q That was in May or June 1921? Where were you at that time?

A I was on Spruce Creek.

Q Some distance away?

A About ten or twelve miles.

Q Have you seen the property since that time?

A No, I haven't.

Q Since June 1921?

A I haven't been on it.

Q And do you know to your own knowledge, or by general reputation, whether or not any known vein or lode existed within the boundaries of the Grant placer claim prior to the time Campbell and Tobin made their discovery?

A No.

Q So far as you know, there was no known vein or lode on the ground?

(Mr. Roth enters objection. Objection overruled.)

MR. STEVENS: That is all.

### **Cross-Examination**

BY MR. ROTH:

Q Do you mean to say there was not a discovery of valuable rock in place within the exterior boundaries of that placer claim before Tobin and Campbell sunk their discovery shaft?

(Mr. Stevens objects to question as not asking witness about anything he might know or hear of. Objection over-ruled and Court rules that witness may answer.)

Q So far as you know, you could not say that there was not a discovery of quartz in place within the exterior boundaries of that Hill Bench Placer Claim prior to the time that Campbell and Tobin made a discovery there?

A Not to my knowledge—I never heard of it and never seen it.

Q I understand you to say that you simply don't know anything about it? Is that what you are undertaking to say?

A I said I didn't know of any quartz claim there on that claim.

Q Do you know where that claim is?

A Yes.

Q Where is it?

A It is right below Quigley's location.

Q Right below Quigley's location?

A Yes sir.

Q So far as you understand, Quigley never did locate on the placer claim?

(Mr. Stevens enters objection which is sustained.)

Q What do you want to testify with reference to that. Please state it. You understood Quigley

had made a discovery of rock in place?

A Yes.

Q What do you want to be understood to say?

(Mr. Stevens makes objection and Court orders that question be made more specific.)

Q Will you tell me, if you know, where the northerly end line of the Hill Bench Placer claim is, or did you know at that time?

A Only in a general way.

Q In a general way where did you know the northerly line of the Hill Bench Placer claim was?

A I knew the northerly line to be on Friday.

Q Not by points of the compass—or the map is wrong.

A I may be wrong.

Q Take the up hill side line of that Hill Bench Placer Claim—you understand which side line I mean?

A Yes, the up hill side line.

Q Designated as the northerly—northeasterly side line—do you know where that line was?

A No, I don't.

Q Do you know where Quigley's discovery was with reference to that side line—that up hill side line of the Hill Bench Placer Claim?

A I know where Quigley's discovery holes were sunk—I don't know where the lines were at.

Q You don't know whether any of them were inside of the placer claim or not?

A I couldn't say.

MR. ROTH: That is all.

**Re-Direct Examination**

BY MR. STEVENS:

Q Did you know that Quigley located his claim in part at least, down hill from his discovery? The Red Top Lode Claim—did it come down in a south-westerly direction down hill?

A I couldn't say.

Q You don't know where Quigley's lines are?

A No, I do not.

MR. STEVENS: That is all.

MR. ROTH: That is all.

ROGER PARENTEAU, called as witness for the plaintiff, but not being present, the next witness was called.

WILLIAM TENEYCH, called as witness for the plaintiff, being duly sworn, testified:

**Direct Examination**

BY MR. STEVENS:

Q You may state your name.

A William F. TenEych.

Q Where do you live?

A Have lived in the Kantishna for the last two years.

Q Where did you live prior to that time?

A At Fairbanks and several of the camps—Ruby—Koyukuk.

Q How long, about, have you been in Alaska?

A Since 1900.

Q What is your occupation?

A Mining and Prospecting.

Q Have you had experience in mining and pros-



pecting in placer locations?

A Yes sir.

Q Have you had experience in mining or prospecting quartz locations?

A Very little.

Q Very little in quartz?

A Yes sir.

Q Has your experience covered most of the time since you have been in Alaska since 1900?

A Not altogether—worked for wages considerable in different places.

Q In mines?

A In mines and the railroad.

Q Do you know the plaintiff, William Grant?

A I do.

Q Do you know William J. Campbell, one of the defendants?

A I do.

Q Do you know Mr. Tobin?

A I do.

Q Do you know of the existence of a quartz mining location made by the plaintiff in this case, William Grant, and known as the Hillside Lode Claim, in the Kantishna Precinct, Alaska, being on the right limit of Moose Creek, near the mouth down towards Friday?

A I know where the location is.

Q Do you know where the location is in a general way of the Quigley location known as the Red Top Lode Claim?

A Yes sir.

Q Where is plaintiff's location of the Hillside

Lode Claim with reference to Quigley's Red Top?

A It is down hill and laps over the placer claim on the upper line.

Q Does the Hillside Lode Claim of the plaintiff begin at the northeasterly end at, or about, the place where the Quigley location ends?

A I don't know as I got it right.

Q Do you know about where the lower end line of the Quigley location is?

A Yes sir, I do.

Q Do you know about where the shaft is located known as the Campbell and Tobin shaft where they made a discovery?

A I know within a very small distance, but not exact feet.

Q Do you know where, about?

A I do.

Q Have you been up there?

A Yes sir.

Q When?

A On two or three different occasions last summer.

Q Did you ever see Campbell working there?

A I saw Mr. Campbell on the windlass.

Q Working on the windlass?

A Yes sir.

Q About what time?

A I couldn't say the time—it must have been—  
(Interrupted)

Q In the neighborhood of June or July?

A June, I should judge.

Q Of 1921?

A Yes sir.

Q What was Campbell doing on the windlass?

A Turning the windlass.

Q Do you know whether or not where he was turning a windlass was at a hole just a short distance below Quigley's end line?

A I was out talking with Mr. Quigley and came out in front and saw them working there—in front of Quigley's house—probably 150 or 200 ft. from there.

Q When was the last time you were there?

A The last time was when Friedrich came out to chain the claim.

Q You helped Friedrich survey the ground?

A Yes sir.

Q Did you see any of the upper end stakes of Grant's quartz location?

A I did.

Q State whether or not the upper end line of Billy Grant's quartz location is about the same place, or near the same line as the lower end line of Quigley's quartz location.

A Did I say quartz location? I am referring to the placer location that I know where the stakes are.

Q Did you see any of the upper end line stakes of Billy Grant's quartz location?

A No, I didn't—I didn't pay any attention to that

Q Did you see Billy Grant's discovery stake up there somewhere?

A No sir—I didn't look at it—wasn't looking for that.

Q Were you down at a place approximately 1500 ft. below—a little less than 1500 ft. below Campbell's shaft—down in a southwesterly direction?

A Yes sir.

Q When?

A During the summer and during the time Mr. Grant staked his quartz.

Q You saw Billy Grant down there?

A I did.

Q What was he doing?

A He was setting his lower end stakes.

Q Of the quartz claim?

A Yes sir.

Q You mean the Hillside Quartz Claim?

A The claim Mr. Grant staked there. He says, "Will you witness those stakes?" I was making garden, and he says, "Will you witness those stakes?" and I said, "I will."

Q And you did witness them?

A I saw him place them.

Q Did you put your name on the stakes?

A I did not.

Q Describe what kind of stakes they were.

A They were stakes 4½ ft. as near as I can guess.

COURT: Long?

A Yes sir. And probably 2½ to 3 inches square—hewed stakes.

Q Were they squared on four sides?

A Yes sir.

Q You saw three stakes there?

A Three stakes.

Q How far were the two outside stakes—about

—from the center stake?

A I should judge 50 ft.

Q From the center stake—about?

A 25 ft.—in that neighborhood.

Q From the center to each corner stake?

A Yes sir.

Q Do you know what was written?

A I do not.

Q You didn't examine?

A No sir.

Q But you saw Billy Grant setting them there?

A I saw him set them there, and he asked me to witness them and I said, "I will." That was all that was said.

Q But the upper end stakes of that claim you never saw?

A No, I never did.

Q Mr. TenEych, do you know of any claims or claim of placer ground near the Hillside Placer Claim of Mr. Grant's?

A The ground that Sutherland is going to work joins on the lower side next to the creek, and the ground on the west side—northwest Friday side has ben worked.

Q Is there a placer mining claim adjoining the westerly end line of the placer claim?

A I believe Pete Leech's does.

Q Does that ground also run into or down to Friday Creek—the placer that joins Grant's placer does it run down to Friday and join?

A Yes sir, It does.

Q This Leech ground—that is located on Fri-



day Creek, is it not?

A Yes sir.

Q Do you know where Grant's initial stake is?

A Yes sir.

Q How far is that initial stake of Grant's placer claim down to Friday Creek?

A I should judge about 300 ft. according to the way claims were staked—330 ft.

Q This ground on Friday Creek that joins Grant's placer claim we are talking about—has there ever been any real mining done on that claim for placer purposes?

A It is a common known fact that Friday Creek has been sluiced and there has been money taken out.

Q You say at the mouth of Friday?

A That is on Leech's ground.

Q The mouth of Friday Creek would be near Grant's initial stake?

A The first claim off Moose Creek principally would be the mouth but not the exact mouth.

Q Moose Creek or Friday?

A The first claim on Friday would be practically the mouth of Friday Creek.

Q That is the claim you speak of as joining plaintiff's claim?

A Yes sir. Of course Moose Creek claim comes up to the edge of the bench and the other claim joins it.

Q I believe you said that it was a well known fact in the community there that there had been placer workings on this creek adjoining the Hillside

**Bench.** Were they recent workings or a number of years ago?

**A** A number of years ago—before I came there.

**Q** You went there when first?

**A** I went there in July 1920.

**Q** That claim, as you understand it, was worked prior to that time?

**A** Yes sir.

Session 2:00 P. M. February 4th, 1922

**WILLIAM F. TENEYCH**, called as a witness for the plaintiff, being heretofore duly sworn, testified:

### **CROSS EXAMINATION**

**BY MR. ROTH:**

**Q** This placer claim that you understand is the claim of Peter Leech on the west, at what you consider to be the true mouth of Friday Creek—that claim has not been mined since you were there?

**A** No sir.

**Q** You understand that the claim is worked out, don't you?

**A** Yes sir.

**Q** How far up on the side of the hill toward the left limit of Friday Creek was that claim worked?

**A** I don't think it was worked up on the bench at all—only in the creek.

**Q** About how high is this discovery stake of this placer claim known as the Hill Bench Placer above the water of Friday Creek—I mean the height of elevation—about?

**A** I should judge probably 75 or 80 ft.

**Q** And from that stake up to this discovery shaft

of Campbell and Tobin there is considerable elevation, is there not?

A Yes, there is.

Q Could you state about how much?

A I should judge probably 25 or 30 ft.

Q Is there a bench along on this placer claim?

A Yes sir.

Q Where is the bench on the placer?

A Below the lower side adjoining Hamilton would be, I should judge, taking in half of the claim—300 ft. an estimate.

Q Hasn't that bench itself a pretty good slope down hill?

A It has some slope.

Q And from the right limit side of the bench, speaking from Moose Creek, which would be the uphill side of the bench—from that point doesn't the hill rise steeply?

A Yes, it is more so than the other.

Q Did you see any shafts or holes sunk on the bench part of that placer claim—where any had been sunk—holes or shafts?

A I saw work where Mr. Grant did assessment work.

Q Which Mr. Grant?

A O. M. Grant.

Q You mean different holes?

A I saw several holes—don't know how many.

Q Were any of those holes on the bench part or on the hillside?

A They were up near where the supposed discovery of quartz is now.

Q And off the bench part of it?

A Right at the beginning of the bench and hill.

Q You take Moose Creek along there adjacent to this claim—is there any place along there that there has been any paying placer mines, that you know of?

A Not that I know of, no.

Q Have you had occasion to pan any of the dirt just below this Hill Bench Placer?

A Well, on the creek just below the mouth of Friday, not the mouth of Friday—but straight down from Friday Creek, I did a little assessment.

Q Did you do any excavating for yourself?

A I did.

Q Where?

A Right below the ledge.

Q How near is it to the lower center stake of that lode claim of William Grant's?

A I don't know the exact distance, but from the corner stake it would be right down I guess 250 to 300 ft.

Q What claim is it on, if any?

A I don't know the name of it—it is Hamilton's claim.

Q Is it the next claim?

A Yes sir.

Q That is known as the Horse Shoe?

A I couldn't say.

Q Where you did excavating there is practically on line under or below where you saw these holes that were sunk there as prospecting holes, was it?

A A little farther down Moose Creek.

Q Did you do any panning there?

A I did.

Q In gravel?

A I did.

Q What was the result?

A I didn't find anything.

Q You never got a color?

A I didn't get anything.

MR ROTH: That is all.

### **Re-Direct Examination**

BY MR. STEVENS:

Q Mr. TenEyck, as a prospector of placer ground in Alaska, I will ask you where, if any place, with reference to a vein or lode in the vicinity of a placer claim—where, if you know, would be the best place to prospect to find placer gold?

A If it was near a lode and I knew there was a lode, I certainly would prospect near the vein if any washed out of the lode—for getting placer.

Q Where would you go with reference to the location of the lode?

A I would go below the lode—below where I knew it was.

Q How could you get below?

A I would be down hill from the lode.

Q Upon what theory would you go down hill to find placer?

A I would go on the theory if any gold come from the lode it would naturally go down hill.

Q State, if you know, whether or not there is any recognized theory in Alaska as to where deposits of gold come from.



A I do not personally know. I know places where they have picked up a little prospect in Chandlar country.

Q Any other places?

A I notice in all our placer claims the fact that the pay streak runs straight with the creek—never follows the creek—follows in a direct line, and from that it looks to me like possibly it comes out of a ledge in a straight line—a pay streak is always in a straight line; in fact, take in the Tolovana country where the quartz or vein of quartz runs across the country, in Otter Creek there was only a few rich wash gold discoveries below that, and in the Nome country where quartz followed the direction of the creek, the pay has been longer pay streaks, and from that I always imagined that gold comes out of these quartz veins and lay in a straight line where the stream is crooked.

Q Your theory is that in the course of a long time—ages—erosion, etc. has crumbled and washed down these quartz veins, is that it?

A Yes sir, and left gold in the line where the gravel and the creek has washed out, the pay goes straight with where it comes out of the formation. That is my theory.

Q That is why you would go down where, if you know, where the lode is to find placer deposits?

A Yes sir.

MR. STEVENS: That is all.

## RE-CROSS EXAMINATION

BY MR. ROTH:

Q You always go down to the bench below—you don't stop on the side of a hill expecting to get pay placer?

A I would go down, and if there was no gravel, I would go down farther.

Q You would go on the bench first?

A I most likely would.

Q You most likely would, wouldn't you?

A I would.

Q You wouldn't expect gold in paying quantities to stop on a hillside—you would expect it to stop where the first deposit was made?

A I would expect it to stop where the gravel left the hill.

MR. ROTH: That is all.

#### **FURTHER DIRECT EXAMINATION**

BY MR. STEVENS:

Q You wouldn't know whether the bed-rock would be comparatively level or whether the bed-rock would be the same way as the surface of the hill pitched?

A No.

Q You would get down under and down hill from the lode?

A If placer deposits didn't show there, you would get it on or at the edge of the hill.

MR. STEVENS: That is all.

#### **FURTHER CROSS EXAMINATION**

BY MR. ROTH:

Q You wouldn't start to sink for placer pay streak before you sunk on the bench below?

A No.

MR. ROTH: That is all.

MR. STEVENS: That is all.

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ALOIS FRIEDRICH, re-called as a witness for the plaintiff, being heretofore sworn, testified:

**DIRECT EXAMINATION**

BY MR. STEVENS:

Q You are the same Mr. Friedrich who heretofore testified in this case?

A I am.

Q You have been sworn?

A Yes sir.

Q Did you ever have experience in prospecting and mining in Alaska?

A I have been prospecting and mining the biggest portion of twenty-four years in Alaska.

Q Do you know whether there exists among the miners in Alaska a theory upon the subject of where this placer gold comes from?

A There is a pretty well settled theory among miners, I think.

Q What is the theory?

A That it comes chiefly from the erosion of quartz leads.

Q Now as a matter of fact, what facts exist that would tend to prove that theory to be good?

A The finding of gold particles which contain quartz when separated from other gravel.

Q That would indicate that the gold came from a quartz vein or lode?

A A quartz vein or lode.

Q Any other indications that placer comes from veins or lodes?

A Sometimes the placers are very much richer immediately in the vicinity or below a lode claim where a lode or lead crosses

Q What do you mean by 'below'?

A I mean immediately down stream or down hill from a lode.

Q You say that occurs frequently?

A It occurs frequently to my knowledge.

Q And as I understand, the theory is that these veins or lodes were very much higher than they now are and they have been worn down by the effects of ages?

A By the elements, yes.

Q Applying that theory, or any other information you might have by reason of experience as a miner, if you were in possession of the knowledge that Mr. Quigley had made a discovery on a quartz ledge above—up hill from this Hillside Bench, where would you say would be the best place, or one of the best places, to prospect for placer deposits?

A Well, I would try my utmost to confine myself down hill and down stream from where that lead crosses, or was supposed to cross.

Q That is, where it crosses, if it comes down straight?

A Yes.

Q And what other advantage might you have by prospecting there for placer?



A It would likely be an enrichment, if nothing else.

Q If it does cross?

A If it does not end down stream or down hill.

Q In doing so, you have the additional advantage of striking the ledge, would you not?

A Yes, of course.

Q You have described in your former testimony about having gone to these various corners of the Hillside Placer Claim. Have you been over the surface of it?

A Of the placer claim, yes. Have been over all of it.

Q Are you able to state whether or not there was any known vein or ledge within the boundaries of that placer claim prior to the time the defendants, Campbell and Tobin, went upon the ground and made a discovery, as they claim, in June 1921?

A No, I would not state there was a known lead or lode outside of Quigley's discovery.

Q You were acquainted with the people around there, were you not?

A Yes, I am acquainted with them all—everyone in there.

Q Are you able to state whether or not there was, or was not, a known vein within the boundaries of the placer claim and outside of Quigley's.

A Not outside of Quigley's, there wasn't.

(Mr. Roth makes objection on the ground of being irrelevant, immaterial and incompetent, and wishes objection to stand before the answer. Objection overruled. Exception taken and allowed.)



Q At the present time, if you know, state whether or not there is in existence any known vein or lode within the boundaries of the Hill Bench Placer Claim, and outside of the boundaries of Quigley's claim, excepting the hole there in which Campbell and Tobin made their discovery?

A I couldn't even say as to there being a discovery in Campbell's hole—I wasn't at the bottom of it.

Q With that possible exception, is there any known vein or lode within the boundaries of the placer claim?

A No sir, not to my knowledge.

MR. STEVENS: You may take the witness.

### **Further Cross Examination**

BY MR. ROTH:

Q Mr. Friedrich, do you claim to be an expert miner?

A No sir, I don't claim to be an expert miner.

Q Then your testimony with reference to the geology or formation of placer gold is your own individual idea?

A It is not. It is what I can learn from experts as they describe it.

Q That is only theory in substance about those placers?

A And considerable personal experience with it.

Q And you know no other theory than the one you have just mentioned?

A Yes sir, there is a theory by precipitation.

Q What do you mean 'by precipitation'?

A Gold traveling by accumulating to certain quartz.

Q Is that all?

A That is all the theories I have—or had anything to do with.

Q I understand you to say that that country is a country of erosion?

A It is a country of erosion.

Q It has been eroded very deep?

A For ages.

Q It is cut very deeply by erosion?

A Correct.

Q And in the process of erosion, I presume there are channels, that in every level as it eroded down, there were rivers and creek channels?

A Sure.

Q And in the process of erosion, those channels were washed out and put in other channels?

A Correct.

Q And those washed out and were put in other channels?

A Correct.

Q Assume one of the first channels on a higher level carried gold in its gravels that it had taken from the surrounding lodes or fissures, or what not, and its creek had eroded down into another creek—that gold I presume would go down into the next creek?

A Gold don't travel very far.

Q If the whole country erodes down, the gold would stay up?

A It would settle straight down—straight down in the next channel.

Q If it goes through a glacier period and the glacier run out, what would become of it?

A It would be carried again a little ways.

Q Gold might be laid down in a different way than simply out of the present known lodes—underneath them?

A Oh yes, if moving masses should come along and move it.

Q Supposing you did go over to this place, to be very concrete, into this Hill Bench Placer Claim, and you, with the advanced state of knowledge you have with reference to the deposits of placer gold, should undertake to locate by staking, would you go up on the side of the hill or down on the bench with the hope of locating.

A I would confine my prospecting pretty well to the bench.

Q Did you see holes sunk on the bench of the claim?

A Those holes are fairly well down on the bench

Q Is this hole that Campbell and Tobin sunk on the bench or is it on the side of the hill?

A Well, that all depends on what you call the bench.

Q What is the surveyed grade from there down hill?

A It would probably be a foot in ten.

Q No more?

A Not very much.

Q How far is it from there down to the bench proper on that claim?

A 300 feet—that is, this lower line of benches.

Q I am talking about the bench proper. I understand there is a bench along the lower part of the

Hillside Bench Claim—how far from the discovery shaft down to that bench—to the upper side of the bench?

A The bench continues pretty well up to this direction. (Indicating on map)

Q You don't understand my question. Straight down hill from the Campbell and Tobin discovery shaft how far is it to the upper edge of the bench?

A It wouldn't be over 50 ft.

Q Was there one of those, any one of those holes that was sunk down there on that bench proper?

A There were several.

Q What experience now have you had yourself about prospecting under a lode claim for placer?

A Not a great deal.

Q Did you prospect in the Kantishna country for placer?

A I did in the early days.

Q I mean in the last trip you were in—since there has been an idea that there are quartz claims there?

A Not one minute.

Q Why didn't you?

A For the simple reason I was looking for quartz claims.

Q If it would be so easy to find placer claims after quartz is located, why didn't you undertake to find placer under a quartz claim?

(Mr. Stevens objects as witness has stated he wasn't looking for placer in recent years when

he was back there. Mr. Roth agrees to withdraw question.)

Q What kind of a lode did you understand this Quigley lode to be?

A I understood it to be a good lode.

Q Of what kind of ore?

A Silver, copper and gold.

Q What is the principal, as you understand, in value of the Quigley lode?

(Mr. Stevens enters objection which is overruled.)

A It is very high in gold, according to assays.

Q How about silver?

A It is very high in silver.

Q You have a quartz claim over there?

A I have.

Q That is up Little Eldorado?

A At Eldorado.

Q Is it Little Eldorado or Eldorado?

A Eldorado.

Q Yours is silver too, isn't it?

A Exclusively.

Q Did you yourself make inquiry to ascertain whether or not this lode of Quigley's on the Red Top is rich in gold?

A If I may answer the question right, I have.

Q What did you do?

A Mr. Quigley showed me his assays.

Q What did they show?

A 16 oz. in gold and 80 oz. in silver.

Q But, say at the time that these boys located their quartz claim there the first of June last year,



1921, what did you understand the character of ore in Quigley's lode to be?

A There is no question but what it is strongest in silver.

Q That is what is known as a silver claim?

A Where it carries heavy in gold, it would be considered a gold lode.

Q Was it free gold?

A There was considerable free gold.

Q How do you know?

A Because you can pan it.

Q Did you pan it?

A No sir.

Q Did you see it panned?

A I did not.

MR. ROTH: That is all.

MR. STEVENS: That is all.

ROGER PARENTEAU, called as witness for the plaintiff, being duly sworn, testified:

**Direct Examination.**

BY MR. STEVENS:

Q State your name, please.

A Roger Parenteau.

Q Where do you live?

A In Fairbanks.

Q How long have you lived in Alaska—about?

A Nearly five years.

Q Are you acquainted with William Grant, the plaintiff?

A Yes sir.

Q Do you know William Campbell, one of the defendants?

A Yes.

Q Do you know Mr. Tobin?

A Yes.

Q What has been your business since you have been in Alaska?

A Mining mostly.

Q Placer mining?

A Quartz mining mostly.

Q And prospecting?

A Yes.

Q Did you know Mr. Grant in the latter part of June or July 1921?

A Yes.

Q Did you know Mr. Campbell at that time?

A Yes.

Q Did you see Mr. Grant and Mr. Campbell on the property in dispute here which is known as—part of what is known as the Hillside Placer Claim on the right limit of Moose Creek?

A When?

Q In the latter part of June or first part of July 1921?

A No, I can't say I saw Mr. Tobin around there in the first part of June.

Q Weren't you there later when Mr. Grant undertook to post up trespass notices on the ground?

A I was there in the latter part of July.

Q Was it the latter part of July? Did Grant have a tent at that time on this ground—placer ground?

A That was what I was doing—helping Mr. Grant put up the tent.

Q Do you know where Grant's cabin is now?

A I haven't been there since.

Q Well, just go ahead and state all you saw that took place in your presence in regard to Billy Grant putting up trespass notices on the ground.

(Mr. Roth objects as immaterial, incompetent and irrelevant. Objection sustained. Exception taken and allowed.)

Q Did you see defendant Campbell use any violence towards the plaintiff, William Grant, on the ground at that time?

(Mr. Roth enters objection but later withdraws same.)

Q Did you see William Grant go from the tent or thereabouts where you were putting up the tent up towards the hill a little ways on the placer claim and nail up a trespass notice?

A I did.

Q Did you see William Campbell anywhere near at that time?

A He was over on the shaft.

Q What did you do then, if anything, after the plaintiff went up to nail that notice?

A After he got through nailing up the notice I went back and got my breakfast.

Q Back into the tent?

A I was in the tent all the time.

Q You went about getting breakfast?

A I finished it.

Q It was in the morning?

A About eight o'clock.

Q What else occurred?

A While I was there I heard Mr. Grant groaning

and I went out and he was laying on the ground.

Q What did you do?

A I went over and helped him up. Mr. Campbell came running towards us and threw another rock.

Q Campbell did?

A We were both together.

Q How near did it come to hitting Grant?

A Two or three feet above his head.

Q Did it come that close to hitting you?

A Well yes, I was right close.

Q About how big was the rock?

A Maybe big as your fist.

Q How far was Campbell standing away from Grant—about?

A Maybe 40 ft.

Q What did—then what did Grant do?

A Grant run to the tent.

Q What did Campbell do?

A Campbell stopped.

Q Did Campbell run after him?

A No.

Q Did Campbell follow him up towards the tent?

A No.

Q Did Campbell come towards him before throwing the rock?

A Yes, a little ways.

Q Campbell came closer to Grant before he threw the rock?

A Yes.

Q Then what did Campbell do, if anything?

A After Grant started running to the tent—after he threw the rock?

Q Yes, what did Campbell do?

A He stopped.

Q What did he do?

A He waited.

Q How long did he wait?

A A few seconds.

Q And Grant went into the tent?

A Yes.

Q What did Campbell do, if anything?

A He stopped there.

Q How long did he stay?

A Until Grant came out.

Q What did Campbell do?

A Grant went in and got a gun, and Campbell backed up a little.

Q Then what did Campbell do when he backed up?

A He stopped.

Q How long did he stay?

A I don't know—just a few minutes.

Q Then what did he do?

A He started running towards the town.

Q Didn't he start towards the shaft where Tobin was?

A Yes, he went and 'hollared' down and told Tobin to come up, that there were two against one up here.

Q Were any words passed between Grant and Campbell that you remember of?

A No—unless the ordinary.

Q Did Campbell use any violent language at Grant at any time?



A I believe, if I remember right, Campbell said he had been throwing rocks at that notice all day until he knocked it down.

Q Had been throwing rocks at the notice—was that all he said?

A That was all he said.

Q When he threw the rock you fellows were close to the notice?

A Yes, a foot or two.

Q Were you between the notice and Campbell?

A Alongside of it.

Q Was Grant between the notice and Campbell?

A No.

Q How near was Grant to the notice?

A Two or three feet—just a few feet.

Q Then what did Grant do, if you know?

A When? After he come out?

Q Where did Grant go, if any place?

A He went down to Eureka—he said he was going to get a warrant against Campbell for hitting him with the rock.

Q Eureka is the place where the Commissioner was located—

A Yes.

Q How far is it where the Commissioner's office was to this tent—about?

A About one-and one-half or two miles.

Q You know as a matter of fact that Grant did go down to Eureka and get a warrant for the arrest of Campbell?

A Yes.

Q Do you know who arrested Campbell?

A Mr. James Burrows.

Q What were you doing there—you say you helped Grant put up the tent at that time and was getting breakfast?

A The day before we put up the tent and didn't get through with it.

Q Had you been at any time prior to that time familiar with this placer ground—the surface of it?

A I walked over it and I see some stakes, but never took particular notice of them—like anybody would seeing stakes going along.

Q Do you know whether or not there was ever a known vein—a vein or lode known to exist within the boundaries of the placer claim of Grant's—the Hillside Placer Claim—until Campbell and Tobin found this ledge at the depth of 40 ft. about?

A No, I never ever knew of one to exist.

Q The surface of the placer ground—does the bed-rock show on the surface of any part of this placer ground, as far as you know?

A Well, up in the extreme corner back of Quigley's house, northwest, there is a point of rock sticking up.

Q Is there any indication there of a vein or lode?

A No.

Q Well, state whether or not, to what extent the placer claim is covered by over-burden.

A Well, I would say—surmise—I don't know—from what I can see of the surface, most all of it is covered with over-burden.

Q In other words, you don't know of any top or apex of any lodes or veins?

A No, no apex there. At the foot of the hill anybody would look for a heavy over-burden there.

MR. STEVENS: You may take the witness.

### **Cross Examination**

BY MR. ROTH:

Q You say there is no apex there?

A No.

Q What do you understand by apex?

A It is where a vein out-crops at the surface.

Q Unless it out-crops at the surface, there is no apex?

A Yes.

Q And still you say there was no apex there?

A Yes.

Q I understood you to say in response to Mr. Stevens that there was no apex there?

A There was no exposure there.

Q If it isn't exposed, you cannot say it is there? Do you wish to be understood to say that it wasn't there?

A I have to see things before I believe them.

Q That is the question. Because you don't see an apex, would you say there was no apex?

A No.

Q All you could say is you didn't know of any apex because you didn't see it. Is that it?

A Yes.

Q Were you in Quigley's tunnel there?

A Yes sir.

Q Was there a lode there?

A Yes.

Q Where was the up hill side line stakes of that placer claim?

A I couldn't—one stake was up on a pointed rock where the road turns going up from Friday and the other stake was up stream from that.

Q Allright, take a line between those two stakes—where was Quigley's tunnel? Was it up hill or down hill?

A Down hill.

Q You say that Campbell was arrested?

A Yes.

Q Grant swore to a complaint?

A Yes, as far as I know—I wasn't there when he swore to it.

Q Who was it arrested him?

A Jim Burrows.

Q They had a trial?

A Yes.

Q As a result of the trial Grant was put under peace bonds?

A Yes.

MR. STEVENS: What was done with Campbell—anything?

A He was fined \$100.00—but the fine was not collected if he would keep the peace.

MR. ROTH:

Q As a matter of fact, Grant was let go without giving any bond, wasn't he?

A I don't know about that.

Q Grant never gave any peace bond?

A I don't know—he settled with the Commissioner.

Q That was before Mr. Wilson, Commissioner?

A Yes.

Q The result of the trial was that Campbell was fined 100.00 and the \$100.00 part was forgotten so long as he kept the peace?

A I believe so.

Q And Grant was ordered to give a peace bond and you don't know whether he gave it or not?

A No.

Q The result was it was just a farce—Grant didn't give any peace bond and Campbell didn't pay his bond. It didn't amount to anything?

A I don't know.

MR. ROTH: That is all.

MR. STEVENS: That is all.

HARRY OWEN, called as a witness for the plaintiff, being duly sworn, testified:

### **Direct Examination**

BY MR. STEVENS:

Q Please state your name.

A Harry Owen.

Q Where do you live?

A Well, now in Nenana at present.

Q Have you been in the Kantishna country?

A Yes sir—since last March.

Q How long have you been in Alaska?

A Since 1897.

Q You mean Alaska?

A In Alaska.

Q Were you in Dawson?

A No sir, only for about a week.

Q When did you first come to interior Alaska?



A In '98.

Q Where did you go to?

A I went on to Dawson.

Q Then were did you go?

A Came out of Dawson, on down river and got caught in the ice and had to stay in St. Michaels the winter of '98 and went up the coast prospecting—was right close to Nome when they struck there.

Q You were in the Nome country in '98?

A In '98.

Q And you have been in Alaska ever since?

A Yes.

Q What business most of the time?

A Mining.

Q Placer mining?

A Yes.

Q Any quartz mining or prospecting?

A Mostly placer.

Q Have you lived in the Tanana valley here?

A Yes.

Q Since about when?

A Had a wood contract for the Northern Commercial Company about three years in the lower Tanana.

Q Wasn't prospecting at that time?

A No sir.

Q With the exception of that time, you were prospecting and mining most of the time?

A Most of the time, yes.

Q You are not the Harry Owen, or some name similar, that was tried in this court for murder several years ago?

A I should say not.

Q Do you know of such a man?

A No, I don't know him.

Q His name was Owens or Owen—understand his name is Owen—you are not that man or any relation?

A No.

Q Do you know of the existence of any theory among mining men—placer mining men—as to where the placer gold deposits come from?

A That it came from quartz.

Q Worn down quartz?

A The wearing down of ledges—decomposition of ledges.

Q You believe to a certain extent in that theory?

A Why yes.

Q Do you know whether or not placer men, if they know of the existence of a quartz lode in the vicinity of a placer claim—do you know about where they would find the best places to prospect for placer ground?

A Yes—you mean sinking and looking around a ledge?

Q If there is a ledge or vein in the vicinity of a placer claim, where would be a good place to find placer with reference to the ledge?

A Below and about where it commences to flatten off.

Q You mean below—down hill from the vein?

A Yes.

Q Why do you say that?

A In the process of erosion the gold would be

more liable to rest on the first level, which would be natural.

Q If the vein matter was being washed down and worn away, you would be apt to find that gold down stream at a lower level, and ordinarily, the nearer you could get to the vein the more apt you would be to find it?

A Yes sir.

Q Unless it is bedrock—if bedrock wasn't so steep, it would hold it—is that true?

A Yes sir.

Q Would you say that down hill from and close to where a ledge was known, or vein was known, would be a fairly good place to prospect for placer deposits?

A I know—(Interrupted)

Q Ordinarily speaking?

A Yes, I know of where they have to hammer rock out of the gold.

Q You mean that the placer gold as you find it is attached to pieces of quartz?

A Yes.

Q And they have to pound it out?

A Yes—before the company would take it.

Q What does that indicate to you miners where gold is attached to pieces of quartz?

A That it is close to a ledge somewhere.

Q That would indicate to you that that gold came from a ledge and brought part of the quartz with it?

A That is what I believe.

Q Do you know the Side Hill—or Hillside Placer

Claim of William Grant's? Have you been on the ground?

A I have been on the ground, but I don't know much about the boundaries—have a general idea.

Q If it is true that Mr. Quigley made a discovery on a quartz lode or vein in place some 200 or 300 ft. above where Grant is said to have prospected and sunk holes in 1920, in November, the place where Grant sunk his holes being down hill from Quigley's quartz find—would you say that immediately down hill from that and as near in line with the direction of the vein as could be ascertained—would you say that would be a good place to sink in looking for placer deposits?

A If I knew Mr. Quigley's ledge carried free gold, I would.

Q But it wouldn't be a bad place even if it didn't, would it? Because a vein or lode might carry free gold at some places and some places not. Isn't that true?

A How is the question again?

Q Could you state whether or not a vein or lode should be all free milling all the way through for miles, or would it sometimes be free milling and sometimes not?

A I am not an expert on quartz. If it carried any free gold, I would look—that would be the best place to look, immediately below—or you might locate the placer claim for galena—there might be sufficient loose galena.

Q There might be deposits of silver?

A Free galena.

Q Do you know whether or not it has already been demonstrated in this vicinity that a free milling vein after you go down below the water line becomes what you call base and not free milling in the same vein?

A I don't know anything about it.

Q So far as you know, the vein might have been part free milling and part base ore. Do you know whether or not it would be possible, if veins in this country or ledges or lodes were miles high at one time and eroded and worn off—you don't know, they might have been free milling part of the time and not free milling the balance of the time?

A That is what Mr. Caps states in his report in that district.

Q Did you see Mr. Campbell or Mr. Tobin sinking the hole which is indicated on the map as being Campbell and Tobin's hole or shaft on the Hillside Bench Claim—did you see either of the defendants around that hole?

A I saw them sinking a hole, but I wouldn't recognize the hole on the plat—that is apparently near, but I couldn't swear to it—I saw them sinking a hole in June.

Q What year?

A In June last year.

Q June 1921?

A 1921—I think that was the month.

Q Do you know where Mr. Grant's cabin is there?

A No sir, I was away this summer.

Q Do you know whether that is down hill con-



siderable distance from Quigley's discovery?

A Yes.

Q Do you know whether Campbell and Tobin have more than one hole?

A No, I didn't notice—both men were working, one in the hole and one on the windlass.

Q Who was on the windlass?

A Mr. Campbell.

Q And Tobin was in the hole?

A Tobin was in the hole.

Q What time was it—about?

A Some time early in June.

Q Did you have any conversation with either of them at the time?

A Yes, I stopped at the hole and talked with them.

Q Which one?

A Mr. Campbell, and Mr. Tobin who was at the bottom of the hole.

Q What was said, if anything, by either Mr. Campbell or Mr. Tobin at that time?

A I believe I commented on the good looking ore on the dump—galena, what they had on the dump—I said, "You are getting some good looking rock." I was a stranger more or less to both of them and our remarks were general.

Q Was anything said about the placer claim at that time?

A No.

Q How deep was the hole then, if you know?

A It would be giving a guess—I understood afterwards that they were on the ledge at that time.

Q Were they down considerable distance?

A Yes.

Q Thirty or forty feet?

A Over thirty feet I would say.

Q That was all that was said at that time?

A Yes.

Q You know the community known as Eureka near this placer claim?

A Yes.

Q State whether or not you made a trip from Eureka over to the Copper Mountain country last summer.

A I did.

Q And how far is the Copper Mountain country where you went from Eureka?

A Twenty-five to twenty-eight miles.

Q How did you travel?

A Afoot.

Q About when was it?

A Some time around the middle of August.

Q 1921?

A Yes sir.

Q Who made the trip with you over there?

A Mr. Campbell.

Q William J. Campbell, the defendant?

A Yes sir.

Q What, if anything, did Mr. Campbell say to you on that trip with reference to this claim in controversy, or the hole that he and Tobin went down on and made a discovery?

A Well, the first day out we stopped at Mr. Mitchell's about half way, and didn't have much conver-

sation in regard to it. But the next day when we started, particularly in the afternoon of the second day, he spoke of his case and all the aspects in regard to the controversy with Mr. Grant—William Grant—and I mentioned to him, I said, "Bill, it looks bad enough to go on the ground, but don't you think it hurt your case to go in that man's hole?" He said they found it hard to sink on the ground where the spring water was bothering, but by going in an old hole, it saved them—it stood up better owing to the ice and didn't slough in and they could get the hole down in better condition than by starting a hole to one side. By the way, I mentioned to Mr. Campbell not to tell me anything about his case that he didn't want known—I didn't want to be interested—I warned him not to say anything as I didn't consider it honorable to repeat anything told in a private conversation.

Q Did he say anything to you with reference to the time he wanted to get down in the hole—that he had to cut timber if he started a new hole, and could get down quicker by going down in an old hole because the ground didn't slough and on account of not having to timber?

A Yes sir.

Q Did he say anything about being in a hurry to get down?

A He didn't say those words, but that was the general sense of it—he was in a hurry and didn't want to lose time cutting timber.

Q Did he say anything with reference to Billy Grant coming from the landing?

A No.

Q Did he mention anything in talking about this hole—did he mention anything about O. M. Grant or 'Red Grant' sinking that hole?

A He said that O. M. Grant—I believe there seemed to be ill feeling—if O. M. Grant considered himself such a prospector, if he went 4 ft. deeper in the hole he would have struck float or eighteen inches to one end of the hole, he would have got float galena.

Q Did he say where they had struck any float?

A He said they had got it at that depth.

Q At what depth?

A At 4 ft. they struck the first float, and that Grant would have found the same float they found at 4 ft. more in the bottom of Grant's hole, and eighteen inches to one end of the hole they got, he said, a sample of high grade gray copper, and he says that little streak—that gray copper—was in sight almost at the top. I asked him what did he mean by streak of rock in place going to the top of the ground and he explained it was just a little red streak that came up the hill and went down into the ground about where this hole was—the hole they were working on—and that streak carried samples of high grade gray copper different to the steel galena they were getting at the bottom.

Q Did he say anything about where that float he found in the hole had come from?

A I asked him, "Do you mean to say that float you got at that depth was from your own lead?" "No" he says, "it rolled down hill or came from some

of the upper leads.”

(Recess of 10 minutes until 3:35 P. M.)

**Direct Examination of Harry Owen—Continued**

**BY MR. STEVENS:**

Q Did Mr. Campbell talk to you about this hole more than once on that trip?

A Yes sir.

Q Did he talk a good deal about this matter?

A That was the principal burden of our conversation that afternoon going up to Copper Mountain. I believe that was the only thing we discussed.

Q Did he talk a good deal about this matter or did he refer to it casually?

A He was talking all the time as we were walking along.

Q He was talking about it all the time?

A Yes sir.

Q Did he say anything on that trip at that time to you about what he thought or expected to be the result when he went on Grant's claim—what he thought Grant would do or what they expected Grant to do?

A I happened to say, “Bill, it is really too bad that you boys couldn't get together and get straight without going to law.” “Well,” he said, “We expected Grant to come and speak to us when he came back, but he never came near us. He might have come to see us if it wasn't for that redheaded ‘so and so’”—meaning O. M. Grant.

Q Did he say anything about O. M. Grant?

A He said he was at the bottom of it all, that he was the one who had prevented Billy Grant from



coming to see them.

Q What did he say about doing the right thing if Billy Grant had come to him? Did you ask him?

A Yes, I said, "What do you mean—would you have given him one-half?"—no, one-third—I don't know as he said he would give him one-third.

Q You asked him if he would have given Billy Grant one-half, and he said, "No he wouldn't have given him half, but might have given him one-third, but that Billy Grant never came to him?"

A Yes.

Q Was there anything else that Mr. Campbell said on this trip that you haven't told about?

A Oh, there was lots of things.

Q On this subject? Do you think of anything else?

A There was a lot of matter—you know when a man talks for four or five hours he says a whole lot—I couldn't tell it all.

Q Are you acquainted with this placer claim of Billy Grant's?

A I have been across it a few times.

Q Do you know whether or not the road that comes down off the hill comes across the placer claim?

A I have been up and down the road many times, but don't know whether it crosses it or not.

Q Do you know whether Tom Aitken was working some mine above this claim up hill aways?

A That is what I understand.

Q Do you know whether or not any ore was found along the road?

A Oh, yes I have picked up lots of samples along the road.

Q Do you know how they got there?

A I suppose it came loose out of sacks—one place I know of a sack half filled with ore.

Q The ore had spilled from Aitken's wagons?

A Yes.

Q You say you were not familiar with the lines—with the stakes or lines of the placer claim?

A No Sir. I have been up to Mr. Quigley's a number of times but I never paid much attention to the lines.

Q You know where Mr. Quigley's house is?

A Yes.

Q Did you know of any known vein or lode existing on or in the placer claim of Grant's prior to the time Campbell and Tobin made a discovery there?

A No.

MR. STEVENS: You may take the witness.

### CROSS EXAMINATION

BY MR. ROTH:

Q You understood, however, that Quigley had made a discovery in that vicinity?

A Yes.

Q But you understood—then you say you didn't know where the boundary of the placer claim was, or couldn't say?

A No, not knowing where one line recrossed on the other.

Q And for that reason you don't know whether there was any known lode on that claim or not?

A I say I don't know where the lines were, but Mr. Quigley was working close—started his tunnel close to the line.

MR. STEVENS: Close to whose line?

A Mr. Quigley's.

MR. ROTH:

Q You didn't know where the up-hill line of the placer claim was?

A He perhaps had a stake close to where the hole was—(interrupted)

Q I am talking about the placer claim—where the up-hill side line of the placer claim was.

A Not exactly—had a general idea.

Q Did you know where any stakes were—either of the two upper end stakes?

A No.

Q For that reason you cannot say whether or not there was a discovery within the exterior boundaries of that placer claim?

A I was answering from a continuance of Mr. Quigley's tunnel, or on down hill—I was talking about the placer claim.

Q I understand you don't know where this up-hill line, or northeast line of the Hillside Bench Claim is located?

A No sir, not exactly where the line is—just a general idea.

Q With reference to your general idea of that line, of the up-hill side, of the placer claim, would you say there was a lode inside of that, or down-hill from that line?

A Ask the question again.

Q Do you know whether or not there was a lode down hill from this up-hill side line of this Hillside Bench Claim?

A No.

Q Do you know whether Quigley's tunnel was below the up-hill side line of this Hillside Bench Claim?

A No sir.

Q Did Mr. William Grant at the time over there—about the time they had this affair in the Justice Court over there, come to you for legal assistance?

A I should say not—I didn't see him.

Q William Grant?

A I didn't see him at the time.

Q Did William Grant at any time come to you about this controversy between him and Tobin and Campbell?

A No sir—there was a man came up one time where me and Mr. Broker were—Mr. Lake—and he asked me what I thought of the matter and wanted to know if I would come down, and I refused to mix in.

Q But you took very grave precautions to tell Mr. Campbell to not tell you anything on that trip to Copper Mountain? Just what was it you told him?

A He said, "There's lots of stuff I can't tell you now, or tell any one." I said, "That is alright, don't you tell anything you don't want anybody else to know." And he said there was lots of stuff not proper to tell until the proper time, and I said, "Don't tell me anything you don't want anyone to know."

Q Why didn't you want him to tell you anything?

A Because, Mr. Roth, I don't want to be mixed in with any controversy at all.

Q Did you consider that the talk you had with him was confidential?

A It was not because I was a stranger to him.

Q When did you first tell O. M. Grant about this?

A I didn't tell O. M. Grant.

Q I mean Billy Grant, the plaintiff.

A Mr. Grant came up to Copper Mountain after I was there three days, he came back with some papers from Fairbanks, and when he was present in the tent eating dinner, himself and Mr. Broker, Mr. Giles, and Mr. O. M. Grant—Mr. Billy Grant, were present and we were discussing the case—all talking about it, and somebody says, "He is now denying going in the hole." I said he told me and another man said he told him that he went in the hole—said he had gone in—he told him the same thing.

Q When did you first tell him in detail what you have related here?

A In Fairbanks here.

Q Never before?

A No sir.

Q That was after the suit was brought, as a matter of fact?

A Yes it was—the case was to come on.

Q As a matter of fact, at the time you and Campbell made this trip to Copper Mountain this suit had already been brought?



A We had no way of knowing.

Q You knew Billy Grant had come to Fairbanks?

A I heard he had gone—never met him but for ten minutes conversation at Eureka.

Q You went to this shaft of Campbell and Tobin about what day did you say?

A I believe it was some time in June—the early part of June.

Q Might it not have been in May?

A I am inclined to think in June—made first location in June—about that time.

Q Who made first location where?

A Made location up on Eldorado Creek some time in June.

Q Weren't they down about 10 ft. at this time?

A No.

Q Wasn't it true that Mr. Tobin introduced you to Mr. Campbell at that time at the shaft?

A No, I 'hollered' down at him.

Q You are sure Tobin did not introduce you at this time?

A Not at this time I am speaking of.

Q Did he introduce you the first time you met Mr. Campbell?

A The first time I met Mr. Campbell, was moving a range for Mr. Broker.

Q Who introduced you to him, if any one?

A I believe Mr. Tobin.

Q And where was it?

A Somewhere in the vicinity of the ground.

Q Of that shaft?

A I don't know whether it was around the shaft—no sir.

Q Isn't it true that right there at that shaft that you—that this conversation about that hole of Billy Grant's took place in the presence of Campbell and Tobin about the 22nd of May when they were down just about 10 ft.?

A No sir.

Q About the 27th of May when they were down about 10 feet?

A No sir.

Q Well, did you at any time have a conversation on that subject with reference to Grant's hole there and what would have happened if they had sunk the hole a little deeper—what they would have found in the shape of float, in the presence of Mr. Tobin and Mr. Campbell about the 27th of May?

A What they would have found if they went deeper in the hole?

Q You related what you say Mr. Campbell told you,—

A That was going to Copper Mountain.

Q —in case O. M. Grant had sunk that hole 18 inches deeper and 4 ft. deeper.

A 18 inches longer.

Q And now isn't it true that a similar conversation to that occurred between you and William Campbell and Mr. Tobin at the discovery shaft of Campbell and Tobin in the month of May?

A Absolutely no sir—it was going to Copper Mountain—Campbell and I alone.

Q At the time you were there at this discovery

shaft—by the way—are you a detective?

A No sir.

Q You are not acting in that capacity?

A No sir.

Q When you were at this shaft here marked Campbell and Tobin's shaft on plaintiff's Exhibit "A", did you notice a hole in close proximity to that shaft?

A No.

Q Was there one?

A I didn't notice any other hole—noticed the men—I was a stranger—was carrying on conversation with them and didn't notice anything around only the ore on the dump.

Q You were acquainted with Tobin and Campbell then?

A Had met them once or twice.

Q Hadn't you and Mr. Broker driven down that road?

A Yes, we had.

Q When was that?

A Not down the road—down the creek. They were moving some stuff coming down Moose Creek.

Q Didn't you cross about the lower end of the placer claim?

A Yes.

Q When was that?

A That was on the ice in May.

Q All done in May?

A It was just before the breakup—would be about the latter part of May—middle or latter part.

Q Just about the 10th day of May?

A I think it would be.

Q When you and Mr. Tobin—Mr. Tobin had been sick with the flu?

A I don't know—he was here working when I saw him.

Q When you come down here along the lower line of the Hillside Bench Claim about the 10th of May, isn't it true that you sited up over the holes that Quigley had sunk on the hill above there and that you stopped and said, "Right here is about where that lode passes."

A No sir, that was the first time I was on the claim and I didn't know who Mr. Quigley was at that particular time—the first time I was on the ground.

Q Isn't it true that Mr. Broker at that time made—said something to you in pursuance of that conversation?

A No sir, Mr. Broker took me down that time to help store a range and at the same time introduce me to the neighbors.

Q You knew about Quigley's discovery there?

A I went in there a perfect stranger—I don't even hardly know where Quigley's house is.

Q You knew about Quigley's discovery?

A I knew Mr. Quigley had a claim.

Q Yes—when you went by there you knew where Quigley's claim was?

A It was pointed to me off in the distance.

Q There was a line of holes at that time when you and Broker went along the lower side line of the placer claim?

A We went there to move a range and confined

ourselves strictly to moving the range.

Q When you went by, didn't you say—when in line with the holes of Quigley's—didn't you say, "Right here is where that lode crosses."

A I couldn't have been half a mile up the creek and said that—I said nothing about it at all.

Q You were doing a lot of 'pumping' of Campbell at that time?

A It took us a day and a half to go up.

Q To 'pump' it out of him?

A It was mere accident that we were together.

Q It took about a day and a half and afterwards you found out he knew you were 'pumping' him and he filled you proper?

A Myself and Mr. Broker made it up between ourselves to stay away from the case entirely—we didn't want to be thrown in the controversy—it was mere accident him accompanying me to Copper Mountain. I stated I was going—arranged that morning if he wanted to come—Mr. Broker and I were going up together but when Mr. Campbell started, Broker said he would remain back and get the horses, so I took a chance to travel with Campbell—had never been up there—and the first day out we thought we would make it through in one day. There was no discussion at all that first afternoon or the first morning, but the afternoon of the second day from after dinner to evening he told me all of these things I am telling, and knowing in a small community how a man may get in wrong, I asked him when he said there was a lot of stuff he didn't want to tell, I said, "Be careful and don't tell me anything



—I don't want to know." I was a stranger to him.

Q You were very reluctant about telling what he told you to anybody?

A Not a bit.

Q You were very anxious?

A No sir, but we have so little to talk about, everybody's business is everybody's, unless they want to keep it to themselves.

Q You found out afterwards that Billy Campbell filled you full proper and it made you sore? Isn't that true?

A Mr. Campbell filled me full?

Q Yes, on that trip.

A He would have to be born over to fill me full.

Q That is what you think—he would have to be born over again before he could fill you full?

A Yes sir.

Q Did you ever have a conversation with Mr. Tobin, one of the defendants in this case, about the controversy between the plaintiff in this case, William Grant, and these defendants?

A I believe we did discuss the case up on Eldorado Creek.

Q When was that?

A That was after we came back from Copper Mountain.

Q What was it you said to him there?

A I don't know.

Q Didn't you tell him Grant had come to you about—had asked your advice about what should be done?

A No sir, I said Joe Lake had come up to the

tent and asked, when that dispute first started in the spring, and that I refused to be drawn into it.

Q What else?

A I presumed that Mr. Grant had sent him—I don't know—but Lake came up and said, "I am a friend of Billy Grant's. What do you think we ought to do?"—or something like that. I didn't know what ought to be done—I refused to be drawn into it and stayed away from Eureka.

Q What else did you say to Jack Tobin, if you remember?

A We talked there for about an hour or three-quarters of an hour.

Q Didn't you advise him to compromise with Billy Grant?

A No, I might have said—and probably did—that it was too bad that those law suits had to be started, that it would be better if we could all get in and work the ground instead of having trouble.

Q You mean as a quartz claim and a placer claim?

A All get in and work with harmony together.

Q Did you ever try to get permission—to get a right to work on the lode?

A I never knew anything about the claim—went in over the ice and knew nothing about it at all.

Q What did Jack Tobin tell you when you suggested if they could get together—what did he say?

A I didn't say they could get together.

Q When you made the suggestion?

A I didn't make any suggestion. I deplored the fact of so much law-suits and litigation.

Q What did he say?

A Well, he made some general remark—I don't know the conversation—I don't remember. I said I might have said it and probably did.

Q Did you ever talk to him at all about their going into Grant's hole—did he ever talk to you about going into Grant's hole?

A No, he said nothing about it.

Q Did you afterwards go to this discovery shaft of Campbell and Tobin?

A No sir.

Q Never again?

A No sir—let me see—when I came back from Copper Mountain I went up and saw Mr. and Mrs. Quigley and passed by, but never stopped or took notice of anything—might have passed by the hole.

MR. ROTH: That is all.

### **Re-Direct Examination**

BY MR. STEVENS:

Q This trip that you and Campbell traveled together to Copper Mountain was in August?

A Yes sir.

Q Of last year?

A Yes.

Q 1921?

A Yes.

Q Do you know where papers were served on Mr. Campbell in this suit?

A Mr. Grant and I think Mr. Clark and Broker came up to the tent—O. M. Grant's tent and Giles—

Q Where?

A At Copper Mountain. Mr. Campbell and his partner Tobin were living three-quarters of a mile below in a tent belonging to Quigley.

Q In the Copper Mountain country?

A In the Copper Mountain country, and I heard Mr. William Grant tell Mace Farrar, he said, "You are to act as marshal to serve the papers," and he gave him some papers and then Mace read it and authorized by the Court to serve papers on Campbell and Tobin, he went down to their tent—I accompanied somebody else in the party—I didn't see him serve the papers in the tent.

Q That was after you had the conversation with Mr. Campbell?

A Yes, it was the first I knew there was any trouble, any law-suit in Fairbanks.

Q When you and Campbell were on the way to Copper Mountain you didn't know this suit or any suit had been started over this ground?

A No. Mr. Campbell stated that he got a letter that Billy Grant was walking the streets of Fairbanks and hadn't got an attorney yet. He led me to believe he hadn't started any suit.

Q So far as you know, Mr. Campbell, when he told you these things on the way to Copper Mountain Campbell didn't know at that time that suit had been started?

A No sir.

Q And you saw Billy Grant, the plaintiff—(Interrupted)

A When I say he didn't know—he didn't know, by his conversation.

Q So far as you know, Campbell didn't disclose that papers had been served?

A Papers hadn't been served because Broker came up along with Grant and that was about three days after we got here.

Q After you and Campbell got there?

A Yes.

MR. STEVENS: That is all

### **Re-Cross Examination**

BY MR. ROTH:

Q Didn't Mr. William Grant tell you on that—I mean William Campbell—tell you on that trip that he had received a letter from his sister, Mrs. James Barrack, which she sent in by John Lee?

A He stated he got a letter.

Q And in the letter didn't he tell you she told him that suit had been brought against him?

A He told me Mr. Grant was walking the streets of Fairbanks and didn't know what to do, that he was undecided just who he was going to employ or what to do—that was all he said.

Q About what day was that?

A That was three or four days before the papers were served at Copper Mountain.

MR. ROTH: That is all.

MR. STEVENS: That is all.

WILLIAM GRANT, re-called as witness on his own behalf, being heretofore duly sworn, testified:

### **Further Direct Examination**

BY MR. STEVENS:



Q You may state whether or not you left Fairbanks and went to the Kantishna country with the injunction that the Court had granted in this case, and the appointment of Mr. Mace Farrar as special officer to serve papers on the defendants, and you took the papers he gave you into the Kantishna.

A Yes sir.

Q About how soon was that after the suit was brought—after the injunction was granted?

A Just as soon as I could make the trip.

Q How soon did you leave Fairbanks after that?

A Believe I left a day or so after—went down to Nenana and got on Mr. Black's boat and traveled with him, and then got horses and went up Copper Mountain with horses.

Q In the month of August 1921?

A Yes sir.

Q When you got to Copper Mountain was Mace Farrar in Copper Mountain?

A Yes sir.

Q Was defendant Campbell at Copper Mountain?

A I believe so—I didn't see him.

Q Was defendant Tobin at Copper Mountain?

A I heard so.

Q Did you see the witness who just testified—Mr. Harry Owen—up there?

A Yes sir.

Q What did you do with the papers relative to delivering them to Mace Farrar?

(Mr. Roth enters objection on the ground that there is no question about the service of the papers, and Court rules that if it is admitted, it is unneces-

sary to show conversation that occurred before the papers were served.)

Q Mr. Grant, I believe you stated in your former testimony in this case that after O. M. Grant had completed doing the assessment work for annual labor on your Hillside Placer Claim in November 1920, that you paid O. M. Grant \$100.00 for his labor. That is true?

A Yes sir.

Q How did you pay him?

A I paid him with one of Tom Aitken's checks.

Q Was that a check on the bank?

A A check on the First National Bank.

Q The First National Bank at Fairbanks, Alaska?

A Yes sir.

Q You wrote out the check?

A I did.

Q Whose name did you sign?

A T. P. Aitken, by Wm. Grant.

Q State whether or not at that time you were drawing checks in payment of Aitken's bills and signing Aitken's name.

A Yes, I did all that.

Q You paid all bills and signed all checks?

A Yes.

Q State whether or not you were in the habit of paying your own bills the same way.

A I was.

Q And after doing so, what would you do with reference to settling?

A We kept a set of books—had a bookkeeper there.

Q When you paid with Aitken's checks, state whether or not you would charge it to yourself as your debt.

A It was charged up to me in the book.

Q State whether or not this particular \$100.00 you paid O. M. Grant with a check you signed Aitken's name to—was that charged up against you?

(Mr. Roth enters objection on the ground that it is not the best evidence. Court rules that he must know and may testify. Exception taken and allowed.)

A Yes sir.

Q Before that time, was there any time where the bank account was in your name or some bank account was in your name and you drew checks and signed your own name?

A Yes sir.

Q And if you paid a bill for Mr. Aitken on your own signature to the check, what was done with that afterwards?

A Charged up to Mr. Aitken.

Q But at the particular time you paid this \$100.00 to O. M. Grant, you were drawing your checks by signing Aitken's name?

A Yes sir. We had a bank book then. When we didn't have a bank book we used common checks—who they were drawn out to—that was put on the checks, also on the stubs.

Q Who was keeping books?

A At that time, a gentleman named Charley Irish.

Q Wasn't George Wesch?

A Not then—last summer.

Q How long did you work for Aitken?

A I quit the last day of June 1921—and left here on the 27th day of May 1919.

Q Did you work for Aitken up to the last day of June?

A With the exception of two months taking a contract.

Q You worked for Aitken practically two years?

A Over two years.

Q Taking out a couple of months working for yourself?

A Yes.

MR. STEVENS: That is all.

### **Further Cross Examination**

BY MR. ROTH:

Q You say some times you drew on your own account?

A Yes sir, before we got a check book.

Q You had an account in the bank in your own name all the time?

A Yes, all the time.

Q At the time you wrote this check to O. M. Grant on T. P. Aitken by yourself, you had a private account in the Bank?

A It was very small—most used up—never had settlement with Aitken until last fall.

Q You had a bank account at that time though?

A I don't believe there was \$100.00—it is in the records of the bank.

Q You ceased working for Aitken the last day of June 1921?

A Yes sir.

Q That is the time you acquired certain property from Aitken, was it?—in your settlement with Aitken?

A No—my settlement with Aitken was after that—that was when I quit work.

Q And that is when Aitken quit the country?

A He had quit the country before. I quit when I got through with the ore at the Landing—had the ore already to ship.

Q Aitken was through and this was the last work you did?

A He practically isn't through—has affairs to wind up there yet.

Q That is when you got through?

A That is when I quit.

Q At that time you acquired considerable property from him, didn't you?

A Well, I purchased the team—the horses—

Q At that time?

A —and the wagon. No, before that—before he left he turned them over.

Q Didn't you acquire some mining ground from him?

A No, I never acquired mining ground from him.

Q Where are those books that you kept at the time that you paid that check to O. M. Grant?

A The books were all turned over to the book-keeper there—he still has the books up in the Ka-tishna.

Q Do you know where they are now?

A No, I don't know a thing about it.

(Mr. Roth asks permission to cross examine



witness on one or two points in former testimony and there is no objection.)

Q I understand you say when you made that discovery of gold on the placer claim that you sunk three shallow holes about two feet deep?

A Two feet was the deepest—might not be two feet—eighteen inches.

Q From one to two feet?

A Yes.

Q Where—I want you to fix that place now that you took the dirt you panned as definitely as you can—how far from the side line—the present side line of the Hillside Lode Claim, that is the westerly side line of the Hillside Lode Claim—where would the point of discovery be?

A Above the cabin.

Q How far would it be from the nearest side line of the Hillside Lode Claim?

A I never measured it by the map—between the cabin and the hole—the scale is 100 ft. to one inch—

Q How far from where the cabin now stands?

A Ten to fifteen feet above.

Q Above and in front?

A Up-stream and up-hill from it.

Q Was it up-hill from the front or back?

A About the center of the cabin—up hill.

Q There is a hole marked 6 ft. deep near the cabin—that would be the place?

A Yes sir.

Q I understand you took two pans down to Friday Creek and panned them down at Friday Creek

and one of them in the bunkhouse up at the Aitken mine?

A That is, at the time the bunkhouse was a tent—at that time there was no bunkhouse.

Q You got the pan out of the assay office?

A Yes, the assay office was in Mr. Johnson's tent—in his own tent next to the bunkhouse.

Q That is where you got the pan?

A I borrowed the pan a short time before from Mr. Quigley.

Q You borrowed it from Quigley?

A We didn't have one so I borrowed it from Quigley.

Q Now that was Quigley's pan?

A Sure.

Q The fact is, you didn't have any assay office at that time?

A Johnson was doing the assay work—we called it the assay office.

Q You didn't have a bunkhouse except a tent, and you didn't have any tools there at that time?

A Yes, we had all kinds of tools.

Q At that time on September 10th?

A We were working a bunch of men.

Q September 10th, 1919?

A Yes sir, that fall they come up off the road and worked there.

Q On September 10, 1919

A Yes sir.

Q Sure?

A Yes sir.

Q You panned it, you say, in that tent?

A Yes sir.

Q What did you pan in—a tub?

A In a tub.

Q Where did you get the tub?

A Right there.

Q It belonged to Aitken's outfit?

A I believe the tub belonged to Mr. Quigley—it had been over there all summer—the cook used it.

Q All summer in 1919?

A Most of the summer.

Q What time did you get there in 1919?

A The first day of June.

Q The first day of June 1919?

A Yes sir.

Q Was it the first or second day you were over there on the ground?

A Left here the 27th day of May and up at the landing we took the horses with us—packed them over—it was either the first or second.

Q You packed your stuff over on horses—packed the tub over there?

A I told you the tub was Mrs. Quigley's—the tub was at the Landing and we didn't get it until later on.

MR. ROTH: That is all.

### **Further Direct Examination**

BY MR. STEVENS:

Q As I understand you, the pan that you did your panning with was borrowed from Quigley some time before you did the panning?

A Yes, we borrowed it a short time after we went up there.

Q About how long before you did the panning?

A Six weeks or two months.

Q Where was the pan in the meantime?

A The pan was around the place—mostly around the tent where the assaying was done.

Q Whose place?

A Up on Mr. Aitken's place.

Q Up hill further?

A No, no, right there where the tents were on the hill.

Q Was it on your placer claim?

A No, it was up where Mr. Aitken—(interrupted)

Q Mr. Aitken had a camp up hill—not on your placer claim at all. When you talk about panning in a tub, it was up at Aitken's place?

A Yes sir.

Q You had borrowed the tub from Mr. Quigley for Aitken's outfit?

A Yes sir.

Q That is where you did the panning?

A Yes sir.

Q This gold pan you had six weeks before borrowed from Quigley—you had it at Aitken's?

A Had it there all the time.

Q I thought you referred to the tent on the placer claim.

A No.

MR. STEVENS: That is all.

### **Further Cross Examination**

BY MR. ROTH:

Q Did you borrow the tub for the purpose of panning?

A No sir.

Q For washing clothes?

A Yes—the cook had it.

MR. ROTH: That is all.

MR. STEVENS: That is all.

Session 10:00 A. M., February 6, 1922.

MR. STEVENS: The plaintiff rests at this time.

MR. ROTH: The defendants now move for non-suit, upon the grounds that the plaintiff has not shown the existence of a valid placer mining claim in the claim designated here at the Hillside Bench Claim, in that he has not, first, shown such a discovery as the law requires; second, that he has not marked the boundaries of his claim as the law requires; and third, has not recorded a certificate of location as the law requires. I especially at this time urge the second ground, without of course, waiving either of the other two grounds. But at this time I wish to urge upon the court and present authorities upon the proposition that the claim was not—the exterior boundaries of the claim were not marked by stakes as required by law, that the stakes did not have written upon them what the law expressly provides must be written on them in order to make the claim a valid claim, and third that the plaintiff did not place stakes as required by law.

(It is agreed to argue the matter, and the jury is excused until 11:00 A. M. during the argument.)

Session 11:00 A. M. February 6, 1922.



COURT: The motion for non-suit by defendants may be denied.

WILLIAM J. CAMPBELL, one of the defendants, called as witness in his own behalf, being duly sworn, testified:

### Direct Examination

BY MR. ROTH:

Q What is your name?

A William J. Campbell.

Q Are you one of the defendants in this case?

A Yes sir.

Q Where were you during the spring and summer of 1921?

A Living at Friday Creek.

Q Where—in the Kantishna Precinct?

A Yes, in the Kantishna Mining Precinct.

Q Did you attempt to locate a lode claim during the year 1921 in the Kantishna?

A Yes sir.

Q Where was it?

A On the right hand side of Moose Creek coming down, and the left hand side of Friday.

Q Was it in proximity to any other quartz claim?

A Yes sir.

Q What?

A The Red Top.

Q Whose claim was it?

A Joe Quigley's.

Q There is a map on the wall, Mr. Campbell, who made that map?

A Jack Tobin.

Q What are Mr. Tobin's initials?

A J. L. Tobin.

Q And who else?

A And myself—together.

Q Take that blue line on there—what does that heavy straight blue line—what is it supposed to represent?

A The Hillside Bench Claim.

Q What kind of a claim is it?

A Placer claim.

Q What do those heavy red lines there represent?

A The lower one is the Silver King Lode Claim, and the upper is the Red Top Lode Claim.

Q What does that top black square represent?

A Joe Quigley's discovery hole.

Q What does that lower—sort of an ellipse—represent?

A That is Joe Quigley's tunnel.

Q What is it marked?

A Quigley's tunnel—"Q's tunnel".

Q What part of the tunnel does it represent?

A The line across there is the lode.

Q Does that represent the mouth of the tunnel?

A The mouth of the tunnel is down below a trifle—the line is where the lode starts.

Q That parallelogram which is marked "Q's cabin", what is that?

A That is Quigley's house or cabin.

Q Over here (pointing to map) is a parallelogram marked "Q's shop"—what is that?

A Quigley's blacksmith shop.

Q This line through here, marked in some kind

of color, right through the center—seemingly through the center—that goes through what is marked “Q’s tunnel”, and the same one through the Quigley discovery, as shown on that map—what is that line?

A The strike of the lead, as far as we can tell.

Q There is something marked “C & T shaft”—what is that?

A Our shaft—Tobin’s and my shaft.

Q On what claim?

A The Silver King Lode Claim.

Q Take the lines of the Hillside Bench Claim—give me the dimensions of that.

A From the southwesterly to the southeasterly stake is 1395 ft.

Q How do you know?

A Measured it.

Q When?

A On the 20th day of this month—or last month, of January 1922.

Q Who measured it?

A Joe Dalton, Jack Tobin and myself.

Q You mean your co-defendant?

A Yes—J. L. Tobin.

Q When you refer to Jack Tobin, do you always mean your co-defendant?

A Yes sir.

Q The three of you together measured it?

A Yes sir.

Q How did you measure it?

A I stood here—Mr. Tobin went out 100 ft. and drew the line—Mr. Dalton went up and stayed there

until we got there—and walked up that way all along the line.

Q From the southeasterly to the northeasterly corner is what distance?

A 105 ft.

Q What?

A 605 ft.

Q How do you know?

A Measured it.

Q The same three persons?

A Yes sir.

Q What is the character of the surface of the ground between those two stakes?

A Just a little ways—150 ft.—it is not very steep—about when we got up there had to take off snow shoes—couldn't climb it was so steep.

Q How did you measure?

A The same way as the lower line.

Q Exactly the same way?

A Yes sir.

Q Did you measure the full length of the tape?

A Excepting when we broke chain one place—just once it was real awful steep—kind of a hump, and just going over the hump we broke chain.

Q From the northeasterly corner stake to the northwesterly corner is what distance?

A 1296 ft.

Q How do you know?

A Measured it.

Q The same three persons?

A Yes sir.

Q What is the character of the surface between

those two stakes?

A Very steep side hill.

Q What is the difference between—the distance between the northwesterly and the southwesterly corner stakes?

A 778 ft.

Q How do you know?

A Measured it.

Q Who measured it?

A Joe Dalton, Mr. Tobin, my partner and myself.

Q Were all those measurements made on the same day?

A Yes sir.

Q You have on this map along this ruffled line, which you state represents the strike of the lode as nearly as you could place it—you have marked 441 ft. What does that mean?

A 441 ft. from the lower line of the Hill Bench to our shaft.

Q How do you know that?

A Measured it.

Q Who measured it?

A Joe Dalton, Mr. Tobin and myself.

Q When?

A On the 20th day of January 1922.

Q The next number I see on there is "25 ft". What does it mean?

A 25 feet?

Q It represents what?

A It represents 25 ft. from the center of the shaft to the upper line of the Silver King Lode Claim, and the lower line of the Red Top Claim.



Q The next figure I see there—or set of figures—is “165 ft.” What does that represent?

A It represents 165 ft. from the initial post—lower post of the Red Top Lode Claim and the upper post of the Silver King Lode Claim up to the lode in the tunnel—in Quigley’s tunnel.

Q The next set of figures I see there is “114 ft.” What does that represent?

A It represents 114 ft. from the lode in Quigley’s tunnel to the upper line of the Hillside Bench Claim.

Q The measurements that you made there, I will ask—state whether or not they were merely surface measurements?

A Yes sir.

Q Did you in making those measurements calculate the difference in elevation between the points measured?

A No sir.

Q Are those accurate measurements—taking into consideration the difference in elevation of the points measured?

(Mr. Stevens makes objection on the ground that witness is not qualified to state. Mr. Roth agrees to withdraw question as witness has said they were surface measurements.)

Q As surface measurements, are they accurate measurements?

A Yes sir.

(Mr. Stevens enters objection as witness has not shown himself qualified to answer question. Court states that he has shown how it was done, and overrules objection.)

Q What was the method of your measurements there—what did you measure with?

A A surveyor's tape.

Q What was the length of it?

A 100 ft.

MR. ROTH: We introduce this plat in evidence.

### **Cross-Examination**

BY MR. STEVENS:

Q Mr. Campbell, do you know what degree of angle is in the corner here that you point out as the southwesterly corner?

A I don't understand what you mean. You mean the direction the lines run?

Q Do you know what angle this is—whether 90 degrees, or 80 degrees?

A How close it comes to being square?

Q You know a right angle is a square?

A I don't know.

Q Down at the southeasterly corner—do you know what degree that angle is? What degree is it?

A Oh, I don't know.

Q You didn't try to calculate that?

A No.

Q Is that true as to the northeast corner of this placer claim—you didn't try to calculate the degree of that angle?

A No—not any corner.

Q Nor the northwesterly?

A No.

Q Nor any other angle on this map—you paid no attention to the degrees?

A No.

Q You gave the direction as it appeared to you?

A Yes.

MR. STEVENS: There is no objection to the introduction of the map. It don't pretend to be a survey or accurate map, except as to distance.

(Court stipulates that it may be admitted, and marked Defendants' Exhibit No. 2.)

### **Direct Examination—Continued**

BY MR. ROTH:

Q Who located, if any one, or attempted to locate what you have designated on that plat as the Silver King Lode Claim?

A Jack Tobin, my partner, and myself.

Q When did you enter upon that ground?

A When did we start to work—to sink on it?

Q No—when did you first enter on the ground?

A On the Silver King?

Q Yes, that is what I am talking about.

A We moved on there about—around the first of May.

Q Somewhere around the first of May?

A Yes.

MR. STEVENS: What year?

A 1921—last year.

BY MR. ROTH:

Q What was the first thing you did towards locating this Silver King Lode Claim—what was the first thing done?

A Mr. Tobin—he was the one done it.

Q What was it?

A Put up prospect stake.

Q When was the first time you commenced work on the claim?

A The 22nd day of May, I think.

Q What year?

A 1921.

Q On the 22nd day of May. Now, where did you do the first work that you did there?

A Right here at this shaft marked "C & T shaft."  
(Indicating on map)

Q That is the Campbell and Tobin shaft?

A Yes sir.

Q What was the first thing you did there?

A Towards work?

Q Yes—that's what I am talking about.

A We drove in some bull picks and put in some powder and shot the frost out.

Q Was there any moss on the ground?

A Very little—probably 1½ inches.

Q You say you put in some bull picks—(interrupted)

A Long pieces of steel with a ring on so you can knock it out again.

Q How did you come to select that place to do that work?

A Mr. Tobin went up and got Mr. Quigley to come down and line it up with his works—he told us to sink right there—that was where the lead was.

Q Was there any other hole or the beginning of a shaft in close proximity to that place?

A Yes sir.

Q Where?

A About 12 ft. looking up Moose Creek from where we started a shaft and a little down hill—not more than a foot or two—a little down hill.

Q 12 ft. from this shaft—would it be in an easterly direction?

A In a southeasterly direction.

Q What was the condition of that shaft when you went there?

A It was full of water—had been sunk there some time before and was full of water.

Q What size was it on the surface?

A It was 6 ft. wide and probably 8 ft. long.

Q What was the condition of it?

A Plumb full of water.

Q Was there anything else about it? Was it in the condition it was in when dug?

A It had sloughed in—was sloughing in all the time.

Q How do you know it was full of water—how do you remember so distinctly?

A It was full of water—it was full.

Q Did you have occasion to do anything with reference to that?

A Only occasion was to bale water when drilling later—not right there that day—used water for drilling holes in rock. That was not at that time.

Q Was any one there with you when you started that hole besides you and Mr. Tobin?

A Joe Quigley.

Q He saw you start it?

A He saw me drive the first bull pick there.



Q Was any one else in close proximity at that time?

A John Busia was working on Quigley's dump right above us—coming out every few minutes and dumping a wheelbarrow full of rock over the dump.

Q Was any one else around there during the first day or two you were working there?

A Not the first day. The next morning Mr. Dalton was there.

Q Did you say Dr. Sutherland was there any time?

A Not until after the 8th day of May—I mean the 8th day of June.

Q You say after the 8th day of June. With reference to the 8th day of June, when did you see him first?

A It was on the 8th day of June.

Q What did you and Mr. Tobin do with reference to that shaft—tell the jury what you did.

A When we started to work, the first two days on this side of the shaft the water bothered.

Q Don't say 'on this side of the shaft.'

A We started to work there and shot out the frost the first day. The second day on the northwest corner of the shaft we struck thawed ground and it was impossible to keep the water out, so we shifted over about two feet to where the frost came up to the surface of the ground on the westerly side and sunk down there, and the third day we got ready to put the windlass on.

Q How far did the frost go down?

A About 5 ft.

Q How did you get the frost out?

A We shot it out with powder.

Q After you got through the frost, how far did you go before you put the windlass on?

A Just a foot or two.

Q How deep was it when you put the windlass on?

A Seven or eight feet.

Q And were you—how long did it take you to get the windlass and put it on?

A We had the windlass on the night of the third night—about.

Q Where did you get that windlass?

A Mr. Tobin made it.

Q Allright. From there now, describe what you did.

A We just continued to sink on down until we hit bed-rock.

Q What was the character of the ground you went through from the surface to bedrock?

A Slide rock—broken-up schist.

Q What depth did you get bedrock?

A I think about 41 feet.

Q When you got to bed-rock, did you go down in the shaft?

A No sir.

Q You never did?

A No.

Q After you got to bed-rock, what was the character of the material that came up?

A It was ore.

Q What part of that work were you doing?

A I was running the windlass.

Q Did you see the ore in Quigley's workings?

A Yes sir.

Q Just tell the jury how the ore that came out of the shaft there after you got to bed-rock compared with the ore of Quigley's.

(Mr. Stevens objects as immaterial, not tending to prove any issue in this case. Objection overruled.)

A It was just the same looking ore as Mr. Quigley had.

Q Do you know how deep you went to bed-rock?

A Just what Mr. Tobin told me.

Q How long did you work there after you got to bed-rock on that shaft?

A We worked every day up until the 6th of June 1921—steady.

Q But that doesn't answer my question. How long were you there working on the hole after you struck bed-rock?

A We worked there until served with a restraining order to get off there.

Q What day did you strike bed-rock?

A On the first day of June.

Q And worked how long steady?

A Up until the 6th day of June.

Q Then you worked six days after you struck bed-rock, at least?

A Yes sir.

Q Any after that?

A Oh, not every day—not steady.

Q Why didn't you work every day there steady?

A We had to rustle timber to put in—timbered it down 15 ft.—went and cut mining timbers—fixed up our camp—and several other things.

Q When you went there first, did anybody object to you going on there?

(Mr. Stevens enters objection on the ground that there is no contention either in the pleadings or otherwise that they went on with the consent of the plaintiff. Objection over-ruled. Exception taken and allowed.)

A No sir, no one objected.

Q Were you interfered with in any way at all before you struck bed-rock?

A No sir.

Q Were you interfered with in any way by any one before the 6th day of June?

A No sir.

Q I mean 1921.

A No sir.

Q What did you do, if anything, on the 6th day of June 1921, with reference to that claim?

A We staked it.

Q What did you do with reference to staking it?

A About 25 ft. above the shaft and a little to the west we put an initial post in there, and put in four corner posts.

Q Take the initial post—what did you put on that post?

A Mr. Tobin wrote it on. I wouldn't say for sure what was on it.

Q What kind of a post was it?

A It was a spruce post, about 4½ ft. long and 4 inches square.

Q Where did you set the next post after you set that initial post?

A This easterly post.

Q You mean the northeasterly?

A Northeasterly.

Q What kind of a stake was that?

A A spruce post.

Q Well, just describe it.

A It was a spruce post about four inches square and four feet high.

Q Did you take it there, or was it a tree, or what?

A We took it there and tied it to Mr. Quigley's post.

Q Did you drive it in the ground?

A Yes, drove it in the ground and tied them up close together.

Q How did you put in the initial stake—what did you call that?

A Center post.

Q You called that the center post?

A Yes.

Q Was that driven into the ground?

A Yes sir.

Q Where was it with reference to Mr. Quigley's lower center post?

A It was tied on the lower side—drove in the ground, and tied to it.

Q What was the third post you put in?

A I didn't go down there—Mr. Tobin put in the stakes on the lower line and I put in two line stakes



—wasn't down there.

Q What line stake did you put in?

A You can't see the lower line stake, that is the southeast stake, from this corner.

Q From which corner?

A From the northwest corner.

Q So you put what?

A I put a line stake in.

Q What kind of a stake was that?

A A spruce post four feet high and four inches square.

Q From where you put that post in, what post if any, could you see?

A I could see the northeast corner and the southeast corner stakes.

Q You put in another line stake, where?

A On this line. (Indicating)

Q Which line?

A On the westerly.

Q Whereabouts on that line did you put that 'line stake?

A About—I think about 800 or 900 feet down hill from the northwest corner post.

Q From there what posts, if any, could you see?

A The lower stake—that would be the southwest and northwest corner posts.

Q Were you there when the northwest corner post was put in?

A I was down there afterwards.

Q I mean the northwest?

A I think I put it there myself.

Q Then you were there?

A Yes.

Q What kind of a post was that?

A It was a post about four feet long and four inches square.

Q Do you know what was written on that post?

A I wrote it on myself—"Northwest corner post. Silver King Lode Claim."

Q Was anything else put on it?

A "J. L. Tobin and William J. Campbell, Locators. 6th day of June 1922."

Q You mean 1921?

A 1921.

Q Do you know what was put on the northeast corner post?

A Mr. Tobin wrote it—I wouldn't say that I read it.

Q Was any other post put on that Silver King Lode Claim?

A One discovery post—put there on the first day of June 1921.

Q What was written there?

A "Discovered ore in place"—that day—the first day of June 1921.

Q Anything else?

A "J. L. Tobin and William J. Campbell, Discoverers."

Q Did you say "Discoverers" of "Locators"?

A "Discoverers." We didn't locate for six days after that.

Q Was that all there was on it?

A That is all that I remember of—I didn't write it myself.

Q Was there any arrows on it, or any numbers of what you claimed, or anything?

A Not on the discovery post that I recall—just discovery post is all I remember.

Q Who wrote it on there?

A Mr. Tobin.

Q At the time that you started work there on the 22nd day of May 1921, was there any—had you seen any quartz in place in a lode within the exterior boundaries of the Hill Bench Placer Claim?

(Mr. Stevens enters objection on the ground that question asks for a conclusion of law and fact, that witness would be allowed to state what he saw or where he saw it, but for him to state whether within the boundaries of the placer claim is a question calling for his conclusion and would be a conclusion of law in this case. Court rules it is one of the litigated questions and sustains objection. Mr. Roth takes exception and it is allowed.)

Q Within the exterior boundaries of the Hill Bench Claim, as marked on that map—within those lines as marked on the map—the blue lines on the map—had you on the 22nd day of May 1921 seen quartz in place in a lode?

(Mr. Stevens enters objection on the ground that question asks for conclusion of the witness as to whether it was quartz matter in place in the lode and also objects on the ground that the witness by his testimony does not even claim that the map is correct as to any of the angles, and hasn't shown himself qualified to make a map of that kind, purporting to put on angles, when he himself says it

isn't correct.) (Mr. Roth agrees to withdraw the question)

Q Mr. Campbell, I call your attention to plaintiff's Exhibit "A" and will ask you to state whether or not within the exterior boundaries of what is marked "Hillside Bench Claim" between what is marked corner posts Nos. 1, 2, 3, and 4,—if on the 22nd day of May, 1921, you had seen quartz in place in a lode.

(Mr. Stevens objects to question as calling for conclusion of the witness and says to let him show where within the boundaries there was a lode. Objection sustained. Mr. Roth takes exception and it is allowed.)

Q Take plaintiff's Exhibit "A"—I will ask you to state whether or not you can point to any place on that Exhibit "A" where prior to the 22nd day of May 1921, you had seen quartz in place in a lode.

A Yes, I think I can.

Q Go ahead and do it.

A In this tunnel marked "Q's tunnel."

Q How far in that tunnel?

A From where Mr. Quigley showed me it started, as far back as it run.

Q How far back did the tunnel run?

A In the hill probably 120 ft. at that time—about that.

Q Mr. Campbell, I will ask you to state, if you know, how many places quartz in place had been discovered on that lode before you started to work on the 22nd day of May 1921.

(Mr. Stevens objects to counsel's assumption—first, in asking for conclusion of witness; second as—

sumption, by saying 'on that lode' referring to the Campbell and Tobin location—that it is the same lode. Court states that it is understood that inquiry was about the lode on Quigley's location. Mr. Roth says that is what he is talking about and agrees to ask the question over again.)

Q How many places, if you know, on the 22nd day of May, 1921, was the Quigley lode exposed?

A Five different places.

Q Where?

A At the discovery post, at his tunnel, and (six different places, I meant to say)—at his discovery post, at his tunnel, and four holes between those two points.

Q Was it four holes between?

A Yes sir.

Q Was that Quigley lode at that time, if you know, a well known lode?

(Mr. Stevens objects to question as asking for a conclusion. Court states that witness may answer, and over-rules objection)

A Yes sir.

Q Did you during the month of May 1921, go to Roosevelt?

A Yes sir.

Q When?

A I went on the 11th day of May.

Q Did anyone go with you?

A Mr. TenEych went down the same day.

Q The witness on the stand here?

A Yes sir.



Q What was your business at Roosevelt at that time?

A I took Tom Aitken's team down there.

Q From whom did you get that team?

A The last time I had it—from George Wesch and Mr. Grant.

Q How did you come to get it the last time?

A I went down to Roosevelt after them to haul timbers.

Q With whom did you make arrangements to get the team?

A I made arrangements first with Tom Aitken.

Q Explain it.

A I had the team all winter hauling timber for Tom Aitken. When he decided he was going to quit, he tried to sell me the horses, but I couldn't see where I could buy them at that time as I only figured I had twenty days or a month's work to do, but I would hire them. He told me to do anything with them to earn their feed until grass come, and I worked them up until such time as Mr. Grant took them away from me to move some stuff down from Aitken's mine up at Eureka Creek, and he told me when he got through—(interrupted)

Q Who told you?

A Mr. Grant and George Wesch—when he got through I could come down there and get them and finish my work, and after—shortly after that—we had a snow storm and I didn't go down after them for quite a little while, until the roads got so I could go.

Q When was that?

A I think it was somewhere around the 22nd of April—the 21st or 22nd of April.

Q Where did you get them?

A I got them at Roosevelt.

Q Whose horses were they then?

A Tom Aitken's.

Q When you took the horses back—you say you went back there on the 11th day of May and took the horses back?

A Yes sir.

Q What condition were they in when you took them back?

A First-class condition.

Q Had you starved them?

A No sir.

Q Are you familiar with horses?

A Yes sir—we called them 'Cayooses'—they wasn't horses.

Q When you got them over to Roosevelt, how long did you stay there?

A When I went over after them?

Q No, when you took them back.

A I got over there about six in the evening and left at nine the next morning—shortly before nine.

Q Where did you stay when there?

A Stayed in Aitken's cabin.

Q Who were there?

A George Wesch and William Grant—they slept in the cabin and myself.

Q Where did you sleep?

A On the floor.

Q Where did you eat when there?

A Ate at George Wesch's.

Q With George Wesch?

A Yes sir.

Q Where did you get the feed to feed the horses?

A I got five sacks of oats and five bales of hay when down at Roosevelt—got one sack of oats from Joe Dalton's cache belonging to Tom Aitken—fed them some native hay, not over 100 lbs.—fed them about 200 lbs. of other feed, such as corn meal and stuff like that. We had a bad storm at that time and I cooked every bit of feed the horses had three times a day.

Q Cooked it all?

A Yes sir—had to cook the feed.

Q Why did you have to cook the feed?

A It goes lots farther and they are old horses and can't chew.

Q They have long teeth?

A Yes.

Q Did Mr. Grant or George Wesch complain about the horses not being in good condition when you brought them back?

A Mr. Grant said he never saw them in finer condition—was very pleased with the way I treated them. The only thing that worried him was that we didn't have enough feed. I told him I took a sack of oats from Dalton belonging to Aitken, and fed them all the corn meal and oat meal we had, and if I had more feed I would have kept them a day or two longer and finished my work, but I didn't have the feed, so took them back.

Q Did you have any conversation with Mr. Grant

over there about his placer mining claim?

A No sir.

Q Did Mr. Grant tell you at that time that he was going to come over shortly and do some work on the placer claim?

A No sir.

Q Are you positive?

A I am certainly positive.

Q When you started to sink this hole on the Silver King Lode Claim in conjunction with your partner, Mr. J. L. Tobin, did you go into a hole that had been sunk on that ground?

A No sir.

Q Did you at any time while you were working on that claim go into a hole that had been sunk by any one else?

A No sir.

Q Did you ever tell any one that you had—I mean did you ever tell any one prior to the time that papers were served on you in this case, that you had gone into one of William Grant's holes?

A No sir.

Q Do you know Mr. Harry Owen?

A Yes sir.

Q You heard his testimony here?

A Yes sir.

Q Did you make a trip with him up Copper Mountain?

A Yes sir.

Q Prior to the time you had gone—you started on that trip—tell the jury whether or not you knew that this suit had been brought.

A I didn't know for sure—only that I had a letter from my sister.

(Mr. Stevens enters objection to witness stating any of the contents of that letter—not being the best evidence. Objection sustained.)

Q Have you that letter now?

A No sir.

Q What did you do with it?

A Left it over in the Kantishna.

Q Did you tell Harry Owen that you had gone into Grant's hole?

A No sir.

Q What did you tell him?

A I never told him anything about it—never told him about the case at all when we went up Copper Mountain.

Q Did you talk about your work?

A Oh yes, Mr. Owens was making lots of enquiries about it—I told him I didn't want to talk about it—from what Mr. Lee brought from Fairbanks

(Mr. Stevens objects to witness stating anything about what Mr. Lee or any one told him, unless plaintiff was present. Court agrees that it is thought not proper.)

(Mr. Roth enters exception at this time to ruling of the Court heretofore made denying motion for non-suit made by defendants. Exception allowed.)

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Session 2:00 P. M. February 6, 1922.

WILLIAM J. CAMPBELL, one of the defendants,



called as witness in his own behalf, being heretofore sworn, testified:

### **Further Direct Examination**

**BY MR. ROTH:**

**Q** Mr. Campbell, on the trip to Copper Mountain, did you tell Harry Owen that you had gone into one of Grants holes and sunk?

**A** No sir.

**Q** Was there conversation had between you and Harry Owen and Mr. Tobin down at your shaft on the Silver King Lode Claim?

**A** Yes sir—the first time he came down there? I didn't understand the question.

**Q** Did you have conversation with Harry Owen and Mr. Tobin at your discovery shaft on the Silver King?

**A** Yes sir.

**Q** What was the substance of that conversation you had with reference to what would have happened if O. M. Grant had sunk that hole deeper?

(Mr. Stevens enters objection on the ground that question assumes that they had a conversation of that kind—it is suggestive and leading. Objection over-ruled.)

**A** We didn't have any such conversation.

**Q** Now you didn't understand my question—pay close attention to questions I ask you. Did you have any conversation over at the shaft with reference to what O. M. Grant would have found if he had sunk that hole he started deeper than he did sink it?

(Mr. Stevens enters objection which is over-

ruled. Exception taken and allowed.)

A No sir.

Q I am not asking you concerning your own shaft you were sinking in, Mr. Campbell. I was asking you concerning the shaft that O. M. Grant had sunk.

A If he had sunk it deeper?

Q Yes, was there any conversation at the shaft where the three of you were present?

(Mr. Stevens objects to question as leading. Objection over-ruled. Exception taken and allowed.)

A I don't remember any conversation.

A On this trip to Copper Mountain, Mr. Campbell, with Harry Owen, just state all of that conversation that was had concerning the work of O. M. Grant—if you had any conversation on that point.

A Never had any conversation on that point at all going to Copper Mountain.

Q Did you any place?

A Well not with—O. M. Grant, did you say?

(Mr. Roth abandons the question as he can't make himself understood.)

Q You heard the testimony of Harry Owen?

A Yes sir.

Q In which he stated that you said that if he had gone eighteen inches deeper or four feet deeper, he would have struck float. You heard that testimony?

A Yes sir.

Q Did you ever have such a conversation on this subject?

A Yes sir.

Q Where?

A Where we made a trip from Eureka out to the railroad in October.

Q Of what year?

A 1921.

Q It was not on the trip to Copper Mountain?

A No sir, never said a word about it.

Q About the first day of February 1921 at Aitken's bunkhouse in the evening after supper, William Grant, O. M. Grant, John Busia, and others of the crew—or the rest of the crew—of Tom Aitken being present, did the following conversation take place: Did you say that Quigley had started his new tunnel, and did William Grant then ask you where did he start it, and did you then say, about forty or fifty feet below the blacksmith shop, and did William Grant then say that he (Quigley) was away down over his line, and did you say, "No, his stake is down another 100 ft." and did he say, "No." Did William Grant then say to O. M. Grant that he (referring to Quigley), must be down with his blacksmith shop over 100 ft. below my line, and did O. M. Grant then say, "The stake I put up is in the draw and you can't see it from the other corner, but the shop must be something like that." And did you say, "His (Quigley's) lower center stake is just about where you (O. M. Grant) were working" and did William Grant then say, "I don't care where his lower stake is, I know where my line is,,," and did William Grant then say that "Quigley could just as well have turned in that dead work for assessment work on the placer and saved Aitken \$100.00," and did Mr. Wil-

liam Grant then say that it was more for Quigley's benefit to hold the Hill Bench for a mill site than it was for Aitken's benefit?

A Yes sir.

(Mr. Stevens enters objection and asks that answer be stricken out until he has time to get in objection. Court denies motion, and instructs witness to give counsel reasonable time to make objection before answering questions. Mr. Stevens takes exception and exception is allowed.

Q Did you ever go to the corner stakes of the Hillside Bench Placer Claim?

A Yes sir.

Q When did you see them first?

A Well, it was some time about—I think in the month of—latter part of July or first of August, 1921.

Q What stakes did you go to at that time?

A I went to all that I could find—the northwest and southwest and the southeast corner stakes.

Q Did you then go to the northeast?

A No, that I couldn't find—looked, but couldn't find it.

Q Do you know where it is now?

A I do.

Q Did you look for it in the same place at that time?

A I didn't look in the same place, but was up by that place a good many times and didn't see it there.

Q At that time what, if anything, did you see written on the southwesterly corner stake?

A I saw "Initial post. Hillside Bench. William Grant, Locator."



Q Did you see anything else?

A No sir, I didn't.

Q What, if anything, did you see on the south-easterly corner stake?

A There was nothing on that stake—no writing.

Q What was the condition of that stake at that time?

A It was leaning over almost forty-five degrees.

Q Which way was it leaning?

A Right straight up with the upper line that runs up there—about that direction.

Q What, if anything, did you see on the north-westerly corner stake?

A I saw some writing where it said he claimed 1500 ft. straight down by 1500 ft. straight up.

Q Any signature?

A I could see "Gregar" but couldn't read the first name.

Q What else did you see?

A I saw William Grant's signature—just his name by looking at it closely, and an arrow pointing down towards the southwesterly stake.

Q What was the character of that writing at that time—was it plain?

A No, it was hard to see—could just make it out.

Q What kind of a stake was that?

A It was a spruce stake.

Q What kind of timber was it—green or dry?

A It appeared dry, of course, then—looked like it had been when hewed made out of a green stake.

Q What was that written with?

A Lead pencil.



Q Did you go to those stakes again?

A Yes sir.

Q When?

A When Mr. Dalton, Jack Tobin and I measured this claim.

Q You stated that was on the 20th day of January of this year?

A Yes sir.

Q At that time what did you see written on the southwesterly corner stake, if anything?

(Mr. Stevens enters objection on the ground that what witness saw on the stake in January of this year after suit was brought is immaterial. Objection sustained. Mr. Roth takes exception which is allowed.)

Q What kind of a stake was on the southwesterly corner?

A An old cottonwood stake.

Q What size was it?

A Four inches square and stood about four and one-half feet above ground.

Q What was its condition?

A It was an old black stake—rot all the way—I mean, black all the way through.

Q What kind of a stake was on the southeasterly corner of the placer?

A It was a cottonwood stake and of the same kind of material—it was black—weather beaten—a real old stake.

Q What kind of a stake was it you found on the northeasterly corner there on the 20th of January this year?

A A spruce stake—new stake—a newly made stake.

Q Did you find more than one?

A No sir.

Q What size was the stake?

A Four inches square and stood a little over three feet above ground.

Q What size was the stake in the northwesterly corner?

A I don't know—between 2½ and 3 inches square—possibly 3 inches.

Q When was the first time that you saw William Grant after you took the horses over to Roosevelt on the 11th day of June 1921?

A The 11th day of May, you mean.

Q I mean the 11th day of May.

A About the 23rd day of June.

Q Where did you see him?

A I saw him right back of our tent—we were living at the mouth of Friday Creek.

Q Who, if anyone, was with him when he came there?

A A gentleman by the name of John Biglow.

Q Was there any one else there at that time?

A Mr. Tobin and Joe Dalton.

Q What occurred at that time?

A Mr. Grant hollered, "Hello Joe" and Mr. Dalton went over to where he was and he introduced him to John Biglow.

Q Where did they go?

A Up to Mr. Quigley's residence.

Q Did Mr. William Grant say anything to you or

to Mr. Tobin at that time?

A No sir.

Q When did you see him again?

A The next day.

Q Where?

A Right down by Bartlett's stable—about 125 ft. below our tent.

Q Where was your tent at that time?

A About 350 or 400 ft. up in a northerly direction from the southerly line of our quartz claim we staked

Q Do you know what placer claim it was on?

A It wasn't on the Horse Shoe Bench, but just below the line—I don't know what the name of that claim is.

Q Who were there when you saw him—who was with him, if any one?

A I couldn't say the men now—Cowan Miller, I believe that's who he was speaking to.

Q How close was he to you?

A About 50 or 60 ft. when I walked past him.

Q Where was Mr. Tobin?

A He was down fixing the garden—down a little ways below.

Q What time of day was it?

A Just about twelve o'clock.

Q Noon?

A Yes sir.

Q Did Mr. William Grant say anything to you at that time?

A No sir.

Q Do you know whether or not he spoke to Mr. Tobin?

A Not while I saw him.

Q What were you doing when you saw him the day before when he came there with John Biglow?

A We were working around our cache, moving our stuff out of a cache that the mice had got into.

Q Where was it?

A Right close to our tent.

Q I will ask you this—is there a road that goes up through this placer claim?

A Yes sir.

Q Where does that road go with reference to the tent you lived in—how far from it?

A It is probably 150 ft. from our tent.

Q How near does that road approach your discovery shaft on the Star King Lode Claim?

A It goes above it about 50 or 60 ft.

Q Is the shaft in plain view of that road?

A Yes sir.

Q What did you have on that shaft at that time, if anything?

A We had a windlass.

Q And was there a dump around it?

A Oh yes, a dump.

Q When did you next see William Grant?

A I believe it was the 3rd of July, 1921.

Q Where?

A I saw him down on the road below our lower line—that would be our southerly line—another road coming down from Eureka Creek.

Q Did you have any conversation with him there?

A No sir.

Q Were you alone at that time?

A Well, I was right around—Mr. Tobin went

down to give Mr. Moody a telegram to send outside.

Q Was Mr. Moody with William Grant at that time?

A Yes sir.

Q When did you next see him after that?

A I saw him down at Bartlett's.

Q When—not where?

A I don't know when it was—about—probably ten days after that.

Q Where is Bartlett's?

A About 6½ miles below Friday Creek—down Moose Creek.

Q On Moose Creek?

A Yes sir.

Q Who was with you, if any one, at that time?

A Mr. Tobin, and a gentleman by the name of Mr. Hansen.

Q Who was with Mr. William Grant, if any one?

A Mr. Hansen was with him—we were all at Bartlett's house together.

Q Did Mr. William Grant say anything to you at that time?

A No sir.

Q Did you say anything to him?

A No sir.

Q How long did you stay there at that time?

A Well, I stayed there until about the 23rd or 24th of July.

Q How long did you and Mr. Tobin and Mr. William Grant stay there together?

A We stayed three or four hours in the cabin



together, and Mr. Grant hitched up and went on to Eureka.

Q Didn't you stay all night together?

A I wouldn't say—think we went up that night about eight o'clock.

Q Did you see him there at Bartlett's again?

A No, the next time I saw him was going up Moose Creek—I met him coming down Moose Creek.

Q Who was with you, if any one?

A No one was with me.

Q When was that—what time was it?

A I wouldn't say it was the day after that I went up or the next day—I went up after something—up Eureka Creek, and we were cutting mining timber—I don't remember whether it was one or two days after.

Q After you saw him at Bartlett's?

A Yes.

Q Which way was he traveling at that time?

A Down towards Roosevelt.

Q And you were going the other way?

A Yes.

Q What, if anything, was said by Mr. Grant at that time?

A He never spoke to me.

Q Who was with him?

A Einar Hansen.

Q Did you speak to him?

A I said "Hello" and he said "Hello"—never stopped—they were riding in a buggy.

Q There was no conversation of any kind between you?

A No excepting that.

Q When next did you see him?

A The next time I saw him was the morning of—I guess the morning of the 22nd of July.

Q 1921?

A Yes sir.

Q Where?

A Up at Hamilton's cabin with Mace Farrar and a man by the name of Bob Ellis.

Q Where is that with reference to your shaft?

A About a mile and a half straight up Moose Creek.

Q Near the mouth of Eureka?

A Right straight opposite the mouth of Eureka.

Q Did Mr. Grant say anything to you at that time?

A No sir.

Q Did you say anything to Mr. Grant at that time?

A No sir.

Q When was the next time you saw Mr. Grant?

A Well, that same afternoon or the same day in the morning.

Q You saw him twice the same day?

A He was at this cabin—had Aitken's cayoses, driving towards Friday, and stopped at the cabin and talked to Mace and went on down there.

Q Where did you see him the other time the same day?

A Went down and got a pair of whiffletrees and he was hauling wood from Tom Aitken's wood pile.

Q What day?

A The same day as I saw him.

Q What day was that?

A Think it was the 22nd.

Q The 22nd day of July.

A 1921.

Q When you saw him down there when he was hauling wood, did he say anything to you?

A No sir.

Q Did you see him the next day after that?

A Yes sir.

Q Where?

A Around hauling wood up around the shaft.

Q What were you doing?

A We were woking in the shaft.

Q Did he say anything to you on that day?

A No sir.

Q Did you see him the next day which would be the 24th?

A Yes sir.

Q Where was he?

A Doing the same thing—around putting up a tent and working around there.

Q What were you doing?

A Working there on—I was working the windlass and Tobin was working in the shaft.

Q Did he say anything to you on the 24th?

A No sir.

Q When did you see him after the 24th?

A In the morning about eight o'clock, I believe, at his tent.

Q What day?

A On the 25th.

Q On the 25th of July, 1921?

A Yes.

Q What occurred at that time?

A We were going up to the shaft, and Mr. Grant come out—in and out several times. While walking up to work we picked up some timber that morning—made two trips, I did, up to the shaft from our camp. We were putting some kind of a fence between our shaft and Quigley's dump to keep the rock from rolling down, which could roll down the shaft. Mr. Grant was in and out of his tent six or seven times probably while I made the two trips, and then after we got up there, he come out and stood out in front of the tent while Mr. Tobin and I fixed up the bulkhead to stop the rocks—it probably took us one-half to three-quarters of an hour—then Mr. Tobin went down in the shaft.

Q How did he get down in the shaft?

A I let him down. When he got pretty well down, but before he got down, Mr. Grant came out of the tent with a little hand axe and had a little box about, I guess a corn box or a pea box, about that size, and nailed it on a stake and walked over towards our shaft about as far—about 20 ft. from the shaft from where I was standing, and started to put it up, and put it up. While he was putting it up I gathered up about a dozen nice little stones and he stood watching me and then walked over to his tent. When he went over to the tent I proceeded to throw stones at the box to knock it down. Mr. Grant came right up and sat down in line with the box, and said, "You will knock it down?" I was down on the hill of the dump

and I walked around the windlass so Mr. Grant was not in line with the box and I threw some more stones. In a little while Mr. Roger come out and he went over and said, "Did he hit you with a rock?" and he said, "Yes." Roger waved to come over and I started over and Mr. Grant jumped up and went in the tent and got a gun—he used bad language and said he would blow my brains out if I didn't get off the claim.

Q I will ask you state when was the first time that he ever ordered you off that claim?

A Right then.

Q I will ask you to state whether or not you did hit him with a rock.

A No sir.

Q Was he down on the ground?

A Yes, he was sitting on the ground.

Q How did he come to be sitting on the ground?

A He walked right up and sat down right in line with me and the box, and I walked over to the windlass and he wasn't in line and I kept on throwing at the box.

Q Did you know what was in the box?

A Oh yes, I saw papers but didn't know what it was.

Q Had you seen a paper before there—before that?

A Yes sir.

Q When was that paper put up there?

A I think about the 2nd of July.

Q Was that put up there on the trip Mr. Grant



came over there when Mr. John Biglow was with him?

A No sir.

Q What was in that notice?

A Which notice?

Q The notice he put up—you say you saw up there—what did it contain—the notice before?

A I only read one.

Q You read one?

A Yes.

Q What was it?

A It said, I am the owner of this Hill Bench Placer Claim and would prosecute any one saw on there. Signed William Grant.

Q Was your name mentioned in the notice?

A No sir.

Q Was Mr. Tobin's?

A No one's name was mentioned.

Q You said there were two notices?

A Yes sir.

Q Where were they put?

A One was put about 10 or 12 ft. further up hill from our shaft, facing our shaft. The other was put 60 or 70 ft. up hill on the Quigley—on the Red Top—about in that direction, facing Quigley's tunnel.

Q Did you ever read that one that was put on the Red Top?

A No sir.

Q Did you ever take down either one of those notices?

A No sir.

Q Did you ever see anybody take them down?

A No sir. That one on the Red Top was standing there when I came out the 3rd day of October 1921.

Q How about that one close to your shaft?

A That got knocked down later some time afterwards—it was laying on the ground the last time I was at the shaft.

Q Do you know how it did get knocked down?

A No I don't.

Q Did you ever—I mean on the 25th of July 1921, did you ever throw a stone at William Grant?

A No sir.

Q Did you have any intention of hitting him with a rock at that time?

A No sir.

Q I will ask you to state whether or not you, at the time that you started work on that Silver King Lode Claim—if you had had any experience at all in quartz or lode mining.

A No sir.

Q Have you had much experience in placer mining?

A Not a great deal.

Q You don't claim to have any theories about mining at all?

A No sir.

MR. ROTH: You may cross-examine.

### **Cross-Examination**

BY MR. STEVENS:

Q As I understand you, Mr. Campbell, you helped to make the map which has been introduced as

Defendants' Exhibit No. 2?

A Yes sir.

Q You and Mr. Tobin made it?

A Yes sir.

Q When?

A I think it was on the 2nd day of this month.

Q Where?

A Over at the Giltley house on the floor.

Q That was the day after this suit was commenced?

A I think it was that evening—yes, it was the 2nd, I am sure.

Q That was after you had seen plaintiff's Exhibit "A", was it not?

A Well, I saw it here, yes.

Q This plaintiff's Exhibit "A" had been introduced in evidence in this case before you started to make your map, Defendants' Exhibit "2"?

A That was before we drew it, yes.

Q State whether or not you took or adopted the same angles on your map, or as near as you could get them, as the angles on the plaintiff's map.

A No sir, we did not.

Q You didn't measure the angles at any of the corners of plaintiff's map?

A No sir.

Q Did any one in your presence—did you see any one?

A No sir.

Q Were you with Mr. Tobin at all times here in the court room when plaintiff's map was examined?

A Most of the time.

Q Do you know whether Mr. Tobin took any measurements from plaintiff's map?

A I don't know anything about it—I never thought about it.

Q Do you know how wide—the approximate width of the Quigley Red Top Lode claim?

A No, I didn't only step it off.

Q Did you ever step it off?

A I did.

Q About how wide was it?

A I figured about 300 feet.

Q You mean from either side of the lode?

A Yes, from the center of the lode.

Q The entire width of Quigley's lode would be approximately 600 feet?

A Yes sir.

Q The claim you staked there adjoining and below or down hill from Quigley's Red Top Lode Claim is the same width?

A Yes sir.

Q Approximately 600 feet wide?

A Yes.

Q When did you first go to the Kantishna country in the vicinity of this ground in dispute?

A 1905.

Q How long did you stay at that time in the Kantishna country?

A I went up there in the spring of 1905 and left there about the first of December 1905.

Q When next did you go to the Kantishna country?

A I think it was 1917.

Q How long did you stay at that time?

A Just a short time.

Q When did you next go?

A In 1919.

Q How long did you stay then?

A I beg pardon—it was 1920—the 4th day of February.

Q Then you have been in the Kantishna ever since except for short trips out? Is that true?

A Yes sir.

Q You have stated, I believe, that you lived down here around about the mouth of Friday Creek, not a great ways from the property in dispute?

A Right on the property.

Q Which property?

A On our quartz claim.

Q How long did you live there?

A We moved there about the first of May 1921.

Q Where did you live prior to that time?

A Well, for probably three weeks we lived down in the woods.

Q How far from this placer claim in dispute?

A About five miles, I guess—maybe a little more.

Q How long did you live there?

A About three weeks, I think.

Q Did you ever live any nearer to the placer claim in dispute than five miles before you moved on what you say was your quartz claim in May?

A I lived up at Eureka Creek.

Q How far from this ground?

A About a mile and a half.



Q How long did you live there?

A Arrived there on the 4th day of February, 1920, and lived there—called it my home—and we went down in the woods to move up those logs to Friday Creek.

Q You still made the Eureka Creek location your home—considered it your home?

A Until we moved to Friday Creek.

Q That is where you live now?

A Yes sir.

Q You had been over this ground different times, had you not, during that time?

A Yes sir.

Q You worked for Tom Aitken in 1920, did you?

A Yes sir.

Q And 1921? The winter of 1920 and 1921?

A Yes.

Q In going up to Tom Aitken's there in your traveling back and forth and in your business, you crossed this placer ground a good many times?

A Yes sir, lots of times.

Q You have been up to Quigley's house?

A Yes sir.

Q I suppose many times?

A Yes sir.

Q And to Quigley's discovery post?

A Not a great many times, but I have been up there.

Q Before you went on this ground in dispute?

A Yes sir.

Q And you have been up to Quigley's tunnel a great many times?

A Yes—not a great many times, but several times

Q Before May of last year?

A Yes.

Q Then in a general way, you were more or less acquainted in that immediate vicinity, were you not?

A I went by up that road lots of times, yes.

Q Did you notice—do you know about the time O. M. Grant sank some holes around in the vicinity of what is now designated as your discovery shaft?

A Yes sir.

Q You saw him there when he was working?

A Yes sir.

Q That was in 19— —was that in the fall—November 1920?

A Yes sir.

Q When you started to work in sinking your shaft on the ground in dispute, did you find that the surface of the ground was frozen?

A Yes sir.

Q How deep was the surface frozen—how deep was it frozen down from the surface—about?

A We broke through the frost about five feet, then in the bottom of the shaft there was a little streak in the rock that stood on edge in the north-west corner of our shaft that let seepage water in the shaft.

Q Was there a large place or just a crevice?

A It was a crevice.

Q You found from the surface down it had been frozen about five feet deep?

A Five or five and a half feet?

Q Then when you got through that frost, was it

thawed from that time on down as far as you went?

A Yes sir.

Q Thawed ground?

A Yes sir.

Q You never used any more powder?

A No, it was thawed.

Q At the time you started to sink, Mr. Campbell, you spoke of seeing another hole about 12 ft. from the place where you sunk.

A Yes sir.

Q You stated, I believe, that it was full of water?

A Yes, pretty near full of water.

Q You don't know how deep the water was?

A No.

Q You didn't measure?

A No.

Q That was on the 22nd of May that you started to work?

A I think it was the day.

Q Was there any snow on the ground?

A It was pretty near all off.

Q Did you have to use any snow shoes at that time?

A Oh no.

Q But there was still snow in places?

A In places.

Q The driving shaft you spoke of consists of a piece of iron with a sharp point and a place immediately above the point that is larger than the rest of the rod, isn't it?

A Yes sir.

Q That is made so you can draw it out handily?

A Yes sir.

Q And at the end near where you drive there is a ring?

A Yes sir.

Q That you use to pull it back out again? That is true?

A That is correct.

Q And you can pound that down in the ordinary frozen ground?

A You can pound it in anything that isn't solid.

Q They use it also to pound—you can sink down through ice?

A Anything.

Q If you want to blow out chunks of ice, you could pound it in the ice and draw it out and put in powder?

A Sure—drive it in anything that isn't solid.

Q As I understand your testimony, you absolutely deny going down in any other shaft except the shaft that you went to bed-rock in?

A Yes sir, I do.

Q And you contend positively that that is the same shaft that you started from the surface and went down to bedrock in?

A Yes, that is just what I do.

Q You didn't go into any other hole or shaft that had been sunk previous to your going there?

A No sir.

Q And you didn't drive the driving rod we have been describing down in the ice in any of those old shafts and blast out the ice?

A No sir.

Q You were present when Quigley and Tobin determined on where to start that shaft?

A Yes sir.

Q And that was the morning of the same day you started to work—May 22, 1921?

A Yes, it was the same day we started.

Q It was really Mr. Quigley that told you where to start, was it not?

A He and Mr. Tobin, they were up looking around.

Q You hadn't anything special to do with determining the place to start the shaft?

A I didn't have anything to do with it—I didn't know.

Q You did what they advised you?

A Mr. Tobin is my boss.

Q He has had more experience?

A He has had some—I haven't had any.

Q In determining there in your presence—when Mr. Tobin and Mr. Quigley were determining where to start the shaft, you may state whether or not they sited and took any lines from Quigley's discovery shaft way up hill, as indicated on your map, down to the mouth of Quigley's tunnel?

A They went up but I didn't watch them—I watched them, but I didn't know how high they went or anything about it.

Q When they went up there was any one down in the vicinity of the shaft for the purpose of setting a stake either to the right or left?

A No.

Q Do you know whether or not it is true that in



determining the place to sink the shaft you speak of, that you aimed to get it down somewhere on the same line as Quigley's tunnel was supposed to run?

A Yes, on the same line.

Q Quigley was there when you started to sink?

A Yes sir.

Q How long did he stay?

A I don't know—I don't know whether we blasted the first hole out or not.

Q Isn't it true that after determining where to sink, he went away about his business quite soon after that?

A Well, probably in five minutes.

Q And John Busia, or some such name, was somewhere in the same vicinity working for Quigley?

A Yes sir.

Q Using a wheelbarrow on the dump near there?

A He was right near there, but I don't know whether he was running a wheelbarrow.

Q It was the same man who was witness here for the plaintiff the other day?

A Yes sir.

Q You say Joe Dalton came along the next day?

A The next morning.

Q Were you working there when Dalton came along?

A Yes sir.

Q And on that same day Dr. Sutherland came there?

A No sir.

Q When was Dr. Sutherland there?

A On the 8th of June; I think it was the 8th of June.

Q But Dalton was there about the 23rd of May?

A The next morning, yes.

Q When you shot out the surface—I mean just below the surface, going through the frost—you may state whether or not as a result of the blasts of powder that the surface around the hole was pretty ragged.

A I don't understand.

Q After you had put in a shot or more to get through the frost in starting your shaft, state whether or not, as a result of the shots, the surface around the hole was pretty ragged in appearance.

A Oh yes, just shot out a little around the hole.

Q After you had gone down with your shaft—that is outlined the shaft at the surface—how big was the shaft at the surface.

A Three and a half feet wide maybe—or four.

Q How long?

A We probably figured on it being five and a half feet long or five feet.

Q Did you maintain that length and width clear down to bed-rock?

A We went down a ways and then timbered the top of the hole before we put the windlass on it—I don't know about it after the windlass was on, I was never down there.

Q About when did you timber around the hole?

A I think it was the third day after we started.

Q Long before you got to bed-rock?

A Oh yes.

Q Outside of the timber you put on there, wasn't the appearance of the surface pretty ragged?

A It was squared up.

Q Did you take off the moss for some little distance back of the edge of the hole?

A No.

Q When you returned the horses that you had borrowed to haul some of your timber, you returned them to Roosevelt to the plaintiff in this case about the 11th of May?

A Yes sir.

Q 1921?

A Yes sir.

Q And when you turned them over to Mr. Grant, Mr. Grant said he never saw the horses in as good condition before?

A Yes, he said they were in better condition than he ever saw them before.

Q Then during the entire trip that you and Harry Owen made together from Eureka to Copper Mountain, you didn't discuss or talk to Harry Owen at all on the subject of your claim or the placer claim, or the matter in controversy?

A What is that question?

Q As I understand your testimony, you say you had no conversation with Harry Owen whatsoever upon any of the subjects in controversy in this suit on the trip that you and Harry Owen made from Eureka up to Copper Mountain in August 1921?

(Mr. Roth makes objection on the ground of being irrelevant, incompetent and immaterial. Court

sustains objection as there wasn't any suit of which any one had notice.)

Q You and Harry Owen traveled together in the month of August between Eureka and Copper Mountain, did you not?

A Yes sir.

Q And no one else was present except you and Harry Owen?

A After we started, no.

Q Did you and Harry Owen have any conversation at all on the subject of your shaft there that is in dispute.

A You mean on that trip?

Q Yes, on that trip.

A Not on that trip, no sir.

Q And you and Harry Owen didn't have any conversation on that trip about your quartz claim that is now in dispute in this suit?

A No sir.

Q I mean yours and Tobin's quartz claim.

A No sir, we did not.

Q And on that trip you didn't have any conversation with Mr. Owen about the plaintiff's Hillside Placer Claim at all?

A Not on that trip.

Q Then, as a matter of fact, on that particular trip you didn't fill Harry Owen 'chuck full', or to any other degree, about what the facts were of your discovery on this particular lode?

A No sir.

Q Mr. Roth asked you as to whether or not a certain conversation was had on the first of February



1921, where you being present, William Grant, the Plaintiff being present and O. M. Grant being present, and a man by the name of Busia, and other members of the crew of Aitken being present. Where was that conversation?

A That was in the bunkhouse—Tom Aitken's.

Q Up hill from the property?

A Yes sir.

(Mr. Roth makes objection that it was not stated to be on the first day of February, but on or about the first day of February.)

Q Tell the jury just exactly what that conversation was.

A I went up there—had been hauling wood up there—and in the evening after supper I told Mr. Grant and all others present that Mr. Quigley had started—Mr. Quigley had started his new tunnel, and Mr. Grant (William) asked me where he started it. "Oh" I said, "about thirty or forty feet below the blacksmith shop." "Oh" he said "he is way over his line now. What the dickens is he down there for?" I said, "No, he has 100 ft. down to his line yet." He said, "No, he hasn't, that hole he was working in before was below his line" and he said to Mr. Grant (O. M. Grant)—he said, "His blacksmith shop must be 75 ft. or 100 ft. below our line, isn't it?" and O. M. Grant said, well, he didn't know exactly, you couldn't see the corner stake that he put up in the draw, but it was something like that—like 100 ft. below his line, and I spoke to O. M. Grant and said, "Quigley's center stake is just above where you was doing assessment work." Billy Grant said, "I don't know where Quig-



ley's center stake is, I know where my upper line is." That was the sum and substance as near as I can remember.

Q Is that all you remember?

A At present, yes.

Q That is all you remember at present?

A Right now.

Q There was nothing else said that you know of at that time?

A Not that I remember of at present.

Q In speaking of the northwest corner of the placer claim of plaintiff's and what you saw on the stake, I think you said you saw some name that sounded like "Gregar"—something like that?

A Yes—"Gregar."

Q But you also saw the name of William Grant, did you not?

A Yes.

Q And when was that, Mr. Campbell?

A When was it I saw it on there first?

Q Yes, you were describing what you saw—I want to know when it was.

A I don't know when I first went up and read "Grant" on the stake—somebody told me it was there.

Q You said it said on the stake "1500 ft. straight down"?

A Yes.

Q And "1500 ft. straight up"?

A Yes.

Q It didn't state 'straight up in the air'?

A An arrow pointed straight up to a stake and one pointed straight down to a stake.

Q That was just above this name "Gregar"?

A Yes sir.

Q You don't know just when you first saw it?

A No I don't, I heard them talking about it.

Q Was it after you and Tobin located your quartz claim, or before?

A I don't know whether it was or not—it was last summer some time.

Q Do you know a man by the name of Gregar?

A I do.

Q In that country?

A Yes sir.

Q You saw the plaintiff quite a good many times after you and Tobin had located, at which times you and Grant didn't have any conversation at all?

A Yes sir.

Q And on July 25th in the morning about eight o'clock, in 1921, you saw Grant come out of his tent with an axe and a box and saw him nail the box on to a stake?

A Yes sir.

Q And that was how close to your shaft, approximately?

A Approximately 20 ft.—it might be 25 ft.

Q And you were standing right there at your shaft—or was you on the dump?

A Yes sir.

Q There was plenty of stones around there, wasn't there?

A Lots of them.

Q And you started to throw stones at the box?

Q Yes.

Q Did you hit the box?

A Yes sir.

Q How many times?

A Oh, three or four times.

Q Did you come any where near hitting Grant?

A No sir, not at that time—he was down towards the tent, when I started throwing at the box.

Q He had nailed up the box and gone away?

A Yes sir.

Q He had left the box and gone down to his tent before you started throwing stones?

A Yes sir.

Q And you stood throwing stones and Grant came out of the tent and sat down on the ground in line between you and the box?

A He didn't come out of the tent—he turned around and walked back.

Q How far was it from where he turned around to come back to where he sat down?

A Oh, maybe 12 or 14 ft.

Q Did you say Roger Parenteau—you know who I mean?

A I do.

Q Did you see him there?

A I saw him after Mr. Grant sat down on the ground.

Q Did you see him come out of the tent—I mean Roger—and look that way when Grant was nailing the box up?

A No sir.

Q When was it you first saw Roger Parenteau?

A After I had walked up away from the lower

end of the dump to the shaft—the upper side of the shaft.

Q How close to the box he nailed up there did the defendant sit on the ground—I mean the plaintiff?

A I think it was about 5 ft.—out on the road.

Q Where did the road go—how close to where the box was nailed?

A The road run between the tent and the box.

Q Is that the same road that runs across the claim into the claim above your shaft?

A No, it is another road.

Q It is a branch road that runs into the other?

A It is the road they haul ore down to the road between our shaft and Mr. Quigley—the road that goes up a steep mountain—they have to have a switchback to get up.

Q When Grant came down and sat down between you and the box, he sat within five feet of the box?

A He didn't sit between me and the box—the box was between me and Grant.

Q The box was right in line between you and Grant?

A Yes.

Q Grant then sat down 5 ft. beyond the box?

A Yes sir.

Q When he was sitting there and before you went any place, did you throw any rocks?

A No, not after he sat there.

Q How many rocks did you throw before he went there and sat down?

A Four or five—maybe six.

Q How big were the rocks?



A Oh, little ones—ten or twelve in my hand. I picked them up while he was driving the stake in the ground. He was standing looking at me when I was picking them up.

Q You mean to say they were so small you could hold ten or twelve in your hand at the same time?

A Yes.

Q Did you throw any larger ones?

A No.

Q As big as hens eggs?

A No, none of the rocks were as large as hens' eggs.

Q None you threw were even as large as hens' eggs?

A No, I don't think there was.

Q Wasn't some of them as large as turkey eggs?

A No.

Q You know the size of turkey eggs?

A I do.

Q After Grant, the plaintiff, had sat down just so the box would be in line between you and he, which direction did you go before you threw any more rocks?

A I went up hill—up towards the shaft.

Q I thought you were standing right at the shaft.

A I was standing on the lower edge of the dump, probably 20 ft. from the shaft.

Q And you went up hill?

A Up above the shaft just on the upper side of the shaft.

Q And then you stopped to throw some more rocks at the box?



A No, I didn't throw any more then.

Q Just then Roger came out of the tent?

A I believe I threw some more and told Roger I was going to knock it down if it took all day. Mr. Grant wasn't in line with the box then.

Q How close did you come to hitting the plaintiff, Grant, with that rock?

A He was off to one side.

Q I didn't ask you that—how close did it come to hitting Grant?

A That rock I threw went into the box.

Q How close did it come to hitting Mr. Grant, the plaintiff?

A He was 5 ft. from the box and the rock went in the box—that was how far.

Q It was as much as 5 ft. from hitting him?

A Roger was between him and the box.

Q How close did it come to Roger?

A He says he was 2 ft. from the box.

Q How far were you from the box when you threw it?

A About twenty-five feet.

Q Did you see Roger lift the plaintiff up?

A No sir, he never touched him.

Q Were you standing there in plain view when Roger came out?

A I didn't see him come out of the tent but after I got up to the shaft I saw him.

Q Didn't Roger come out and go up to where Mr. Grant was then lying on the ground?

A To where Mr. Grant was sitting on the ground—he did.

Q Did you hear Mr. Grant groaning?

A No sir.

Q Were you close enough to hear—within about 25 ft.?

A Yes sir.

Q If he groaned very loud you would have heard him?

A Yes sir.

Q You were nearer Grant than Roger was when in the tent?

A No, I don't think the tent was over 12 or 14 ft. from where the box was.

Q Then the tent was nearer the box than the place where you stood?

A Yes sir.

Q You say Grant was sitting on the ground at this time when Roger came out?

A Yes sir.

Q You mean to say he was not lying on the ground?

A He was sitting on the ground.

Q You didn't see him lying on the ground?

A No, I never saw him.

Q You saw Roger when he came up?

A I did.

Q You say Roger didn't help him up?

A I do.

Q When Mr. Grant got up, you saw him?

A I did.

Q Did Grant run towards the tent?

A You bet he did.

Q Did you run after him?

A No sir.

Q Not after he started going to his tent?

A No sir.

Q You didn't run several steps even?

A No sir.

Q Did you find out afterwards what was in this box in the way of a notice?

A I went up and looked at the notice—saw three or four stones and saw a trespass sign.

Q A trespass notice?

A Yes sir.

Q Signed by William Grant?

A I think so.

Q You saw him when he nailed it up?

A I did.

Q You said Roger waved at you—to do what?

A After he came up to the box I told Roger I was going to knock the box down if it took all day, and he waved at me. I went around from the back side of the shaft to the front of the shaft and jumped across a ditch we had to keep water from going in the shaft, and just as I jumped across the ditch, Mr. Grant got up and run in the tent and got a gun and said he would blow my brains out if i didn't get off the claim.

Q Did you get off?

A I did shortly after that.

Q Shortly after that you were arrested by an officer?

A Yes sir.

Q And fined \$100.00?

A Well, I believe he told me if I went down and

got into any more trouble with Billy Grant I could come up and give him \$100.00.

Q You had a hearing?

A I had a hearing, yes.

Q And he fined you \$100.00, but didn't make you pay it?

A He told me if I went down and got into any more trouble it would cost me \$100.00.

Q That was all he said?

A To the best of my recollection, it was.

Q Why was it you threw those stones at this box?

A To knock it down, of course.

Q Why did you want to knock it down?

A I knew from what had been told me that Mr. Grant was looking for trouble and I thought I would give him a hand.

Q And you wasn't going to give him any hand as long as you could throw rocks at him?

A I wasn't going over there when I knew he had a gun.

Q When you were throwing rocks at the box, were you mad?

A No, I wasn't mad. I was having lots of fun just to see what Billy Grant was looking for.

Q But you wouldn't go up to him unarmed and willing to fight the little man?

A Bet your life I wouldn't when I knew he had gone to Roosevelt and got a gun.

Q You were throwing rocks after he had the gun?

A Yes.

Q You weren't afraid to stand 25 ft. and throw rocks?

A I wasn't throwing at him—was throwing at the box, and hit it too.

Q Weren't you afraid he might turn loose on you with the gun?

A I wasn't afraid he would turn loose as long as I didn't go over.

Q You didn't think the gun would shoot that far? Did you have nerve enough to go up there like a man and fight him?

A No, I didn't have nerve enough to jump on Grant or half a dozen like him.

Q Isn't it true, that you are an over-grown man but you wouldn't jump on him unless you had the best of him?

A No, I wouldn't jump on Mr. Grant at all.

Q Well, Mr. Campbell, did you ever do any work on—we will say on your—within the boundaries of what you claim to be your quartz claim—yours and Tobin's—excepting the work you did there right around the shaft?

A Right at the shaft?

Q Yes, did you ever do any work excepting that?

A That is all, excepting about 40 or 50 ft. below the shaft we just cleaned the moss off—we figured on driving a hole.

Q You didn't drive it?

A No, that was the day I was arrested.

Q Did you find any placer gold?

A No sir.



Q Not within the boundaries of what you claim is your quartz claim?

A No sir.

Q Did you ever find any placer gold within the boundaries of Quigley's quartz location—called the Red Top?

A Any placer gold?

Q Yes, any placer gold.

A No.

Q Did you ever prospect for placer gold?

A Not for placer gold.

Q Did you ever find any placer gold any place within the boundaries of this placer mining claim of Grant's as you have indicated it here on this map, defendants' Exhibit "2"?

A No sir.

Q You never found any placer gold?

A No.

Q Did you do any prospecting to find placer gold?

A Yes sir.

Q Where did you prospect?

A Out of the stuff that come out of the bottom of the shaft.

Q Did you find any placer gold?

A No.

Q Did you find any placer deposit there?

A I did. It came out of the hole.

Q What part of the hole?

A Down at the bottom, or near the bottom.

Q Did you find placer gold—I thought I understood your testimony that when you struck bed-rock

you went down four or five feet into the vein?

A Yes, I believe six or seven feet—I don't know.

Q Into the vein?

A Yes.

Q That was all the further you went down into the vein?

A Yes sir.

Q That would be the bottom of the hole?

A Yes sir.

Q Did you find placer gold at the bottom of the hole?

A No, we didn't find gold.

Q I thought you said—(Interrupted.)

A I said placer silver—I did find placer silver.

Q Whether it is gold, silver, or cinnabar, I would like—I mean did you find any placer deposit of gold, silver, cinnabar, or other precious metal or mineral?

A Yes sir.

Q You found some placer deposit of precious mineral at the bottom of the shaft?

A We found silver.

Q When?

A Before we got down—I don't know when Mr. Tobin panned first—when we first found silver placer.

Q When was the first time—when was the last time you did any work around your shaft?

A The last time we did any work, we worked there just a couple of days before Mr. Tobin went up Copper Mountain—I don't remember just exactly when he went.

Q Did Tobin go to Copper Mountain before you went with Owen?

A Yes.

Q How long before?

A I don't know what day he went—I know now, he went up on the 11th of September.

Q It was in August you and Owen went up, wasn't it?

A I will tell you, he went on the 11th—we were served with papers up there.

Q What month?

A I know it was the 11th—I have reason for knowing what date it was—the 11th of August, I guess.

Q You couldn't have been served the 11th day of August.

A It was two days after I went up and you see Tobin—we were served at Copper Mountain. I got up on the 18th.

Q Of August?

A Yes.

Q And he went up on the 11th—that is, he started for there? Is that right?

A Yes sir.

Q You were served about the 20th of August?

A It was the 20th at six o'clock in the evening.

Q At Copper Mountain?

A Yes sir.

Q About thirty miles from this property?

A About thirty.

Q You on the 12th day of August 1921 covered substantially all the ground here designated on the

map here as Grant's placer claim—you covered that placer location?

A No sir, not all of it—I covered some of it.

Q Practically all?

A About one-half.

Q Mr. Campbell, at or about that time you marked the boundaries of your ground, did you not?

A Yes sir.

Q And you afterwards filed a location certificate, did you not?

A Yes sir.

Q Were the statements made in the location certificate that you filed on record there true?

A Yes sir.

Q Did you ever file any amended location certificate of this claim?

A No sir.

Q You only filed one location certificate of this placer claim?

A Yes sir.

Q It was the very next day after that, August 13, 1921, that you filed of record this location certificate, was it not?

A Yes sir.

MR. STEVENS: We offer in evidence as a part of the cross-examination of Campbell, location notice—the certified copy.

(Mr. Roth enters objection to same as being irrelevant, incompetent and immaterial, and cannot have any effect because it is dated long subsequent to the time of location of this lode claim and can have no binding force at all. Court over-rules objec-

tion and allows location certificate to be admitted and marked plaintiff's Exhibit "F". Mr. Roth takes exception which is allowed.)

Mr. Stevens reads Plaintiff's Exhibit "F" to the jury, as follows:

"Certified Copy. No. 3190. This is to certify  
"that I, W. J. Campbell, a citizen of the United  
"States and above the age of twenty one, have  
"on this 13 day of August, 1921, located placer  
"mining claim to be known as the Troy Bench  
"Claim located as follows: Initial stake 1420  
"feet east of Friday Creek Claim along north-  
"ern boundary of the Hamilton bench claim  
"(name of claim unknown) thence 1320 feet  
"in a westerly direction to post No. 2, thence  
"660 feet in a northerly direction to post No.  
"3, about 25 feet on Red Top Lode Claim,  
"thence 1320 feet in an easterly direction to  
"Post No. 4, thence 660 feet in a southerly dir-  
"ection to post No. 1, or location post, the  
"point of beginning. Discovery made August  
"12, 1921, said claim being 660 feet by 1320  
"feet.

W. J. Campbell

Locator.

"Filed for record August 13th, 1921 at 8:10  
"P. M.

"C. Herbert Wilson,

"Recorder and Commisioner

"This is to certify that the foregoing is a true  
"and accurate copy of the document known as  
"No. 3190 and recorded in the records of the



"Kantishna Mining and Recording Precinct  
"of Alaska.

"In witness whereof I have hereunto set my  
"hand and official seal this 20th day of Sep-  
"tember 1921.

"C. Herbert Wilson  
"(SEAL) United States Commissioner  
and Ex-Officio Recorder."

BY MR. STEVENS:

Q Do you know where the Friday Creek Claim  
is?

A Friday Creek Placer Claim?

Q It speaks here of 'Friday Creek Claim.'

A I never read the thing or didn't write it out.

Q You signed it?

A I guess I did.

Q That claim adjoins Billy Grant's Placer Claim,  
don't it, down at the end?

A The end of it joins on to the side of Friday  
Creek Placer Claim.

Q The end of Billy Grant's claim would join on  
to the side of the Friday Creek Claim?

A Yes sir.

Q Then you started from Friday Creek Claim,  
which would be practically here at Billy Grant's initial  
stake, and you measured 1420 feet in an easterly  
direction from Friday Creek Claim. along the northerly  
boundary of the Hamilton Bench, and at that  
point, wherever it is, you established your initial  
stake?

A I didn't measure it—I just went up and put a stake up.

Q How near Grant's stake?

A A little further up creek.

Q It is beyond that?

A Ten or twelve feet up hill.

Q It would be some point east, or northeast, from Billy Grant's southeasterly corner?

A Yes sir.

Q That is your initial stake?

A Yes sir.

Q Then you run from there right back along this same line you came—1320 feet?

A I stepped it off.

Q That would bring you down not quite to Billy Grant's initial stake?

A Seventy-five or eighty feet.

Q That would be within the boundaries of your quartz claim—yours and Tobin's?

A Yes sir.

Q From there you go in a northerly direction 660 ft., do you not?

A Up a little ways.

Q Would that go up in the vicinity of the cabin—Quigley's house?

A Along this line. (Indicating on map)

Q It went within the boundaries—that stake would be 25 ft. within the boundary of Quigley's claim?

A Something like that.

Q From there you run in an easterly direction 1320 feet, do you not?

A Yes sir.

Q Which would run it just past the easterly side line, or end line, of Billy Grant's placer?

A Some place near there.

Q From there you go 660 feet down to place of beginning?

A That is it.

Q You based that location on the discovery you made from the material that came out near the bottom of Campbell and Tobin's shaft?

A On the material that came out—I don't think I panned that stuff that day.

Q You panned it some time?

A I don't believe I ever panned myself.

Q Did you ever see any placer gold or silver any other place?

A I saw what they called placer silver.

Q That is what you based the location of your claim on so far as discovery is concerned?

A Yes, that is what I did.

Q Mr. Campbell, when you staked—you and Tobin staked, your quartz claim, you have already described the end lines, or the end line rather of the upper up-hill end of your claim.

A You mean I described it?

Q Yes. Now, your lower end line would be approximately 1500 feet down hill from that, would it not?

A Yes sir.

Q Was your lower end line substantially parallel with the upper end line?

A I think it was.

Q Running in the same direction?

A Yes.

Q You were down when you and Tobin staked the lower end line?

A No, Tobin staked it.

Q Have you ever been down?

A Yes.

Q Do you know where the lower end line is of your quartz claim?

A Yes sir.

Q Did you run down towards Moose Creek, as far as Moose Creek?

A No sir.

Q About how far on the right limit of Moose Creek did you stop?

A Just about the line—on the upper line of the first tier bench—that would make the creek claim first bench and our lower line about on that line—on the upper line.

Q You mean your lower line is on the upper side line or the lower side line of the first tier bench?

A I mean on the upper side line of the first tier bench.

Q Do you understand that this ground that is immediately below the lower side line of your Troy location—do you understand that is Hamilton's?

A The Horse Shoe Bench?

Q Yes, that is the same bench referred to as Hamilton's bench?

A Yes sir.

Q Now, does your quartz location—yours and Tobin's—go on past that?

A Past the Horse Shoe Bench and just about the line—the lower line of the next tier.

Q Do you understand that this Horse Shoe Bench of Hamilton's is the second tier of Benches?

A The Horse Shoe is the third tier of benches from Moose Creek, and the Hill Bench is on the fourth tier—Horse Shoe is third.

Q Then your claim must run from the upper end line down through the Horse Shoe, which you say is the third tier—then it must go through the next bench which would be the second tier and down into the first tier.

A No, just about the line—the upper line of the first tier—that is, the upper hillside line of the first tier.

Q According to that then, the Hamilton Bench would be the second bench instead of the third.

A There is one bench claim below our line—one bench claim—there is the creek, then the first bench and the second bench, and Horse Shoe is the third bench.

Q Then your location goes through Hamilton's bench and clear through the next bench below.

A Not down on the first tier at all—just about the line between the first and second tier.

Q And you maintained approximately the full width of 600 ft. through the entire length of your claim?

A Yes sir, up and down.

Q 600 feet wide?

A Yes sir.

Q That is all on the right limit of Moose Creek?



A Yes, that is, coming down Moose Creek.

Q In other words, Moose Creek runs from east to west generally speaking, does it not?

A No, Moose Creek runs pretty near north and south right there.

Q Do you understand what the right limit of a creek means?

A Coming down creek—looking down creek.

Q Looking down creek, this quartz claim of yours is on the right hand side?

A Yes sir.

Q And Friday Creek runs down into Moose Creek off your property?

A Yes.

Q So then your property with reference to Friday Creek would be on the left limit of Friday Creek?

A Yes sir.

(Recess for ten minutes until 4:10 P. M.)

WILLIAM J. CAMPBELL, one of the defendants, called as witness in his own behalf, being heretofore sworn, testified:

**Cross-Examination, (Continued)**

BY MR. STEVENS:

Q Mr. Campbell, when was the last time you were in Quigley's tunnel—about?

A The last time you mean now?

Q Yes.

A I was in Quigley's tunnel on the 2nd day of October, last fall.

Q It was timbered at that time around the shaft?

A Yes sir.

Q I mean around the opening of the tunnel.

A Yes, it was timbered right to the mouth.

Q Do you know when the timber was put there?

A Along sometime in the summer time—I don't remember when it was timbered.

Q Was it put there before you and Tobin went on the ground in dispute?

A Before we went on?

Q Yes.

A I wouldn't be able to tell you.

Q I believe you stated you were in Quigley's tunnel prior to the 22nd of May 1921?

A Yes, several times.

Q Did you ever work in that tunnel?

A No sir.

Q You were working for Aitken?

A I worked for Aitken.

Q You are not able to state how far above the mouth of the Quigley tunnel it is until you find rock in place?

A Not from my own knowledge—only from what Quigley told.

Q I mean your own knowledge.

A I don't know anything about it.

MR. STEVENS: That is all.

### **Re-Direct Examination**

BY MR. ROTH:

Q Mr. Campbell, Mr. Stevens asked you to relate all of the conversation you had up there in the bunk-house when the crew of Aitken was present and you

stated some conversation. And you stated that was all you could remember then—you stated in reply to Mr. Stevens after you related the conversation there that that was all you could remember then.

A Yes.

Q Was there any more conversation than what you told Mr. Stevens at that time—about the first of February 1921?

A Well, he had been talking to Grant about another proposition, but had been talking to him about that lots of times.

Q What was that?

A He complained about Joe Quigley could just as well put in the dead work as assessment work and saved Tom Aitken \$100.00—but I heard him kick about that so often.

Q Did he say it at that time?

A Yes, at that time—but I heard him say it lots of times.

Q When you were over at Roosevelt—

(Mr. Roth asks permission to ask a question on a point previously overlooked, and Court agrees.)

Q When you were over at Roosevelt talking with Grant—in the conversation you had with him there—you stated that he did not tell you certain things. Now just relate the conversation you did have with him there.

(Mr. Stevens interposes objection, but Mr. Roth explains that this was the time he was over there and goes to the testimony of Mr. William Grant who testified he had a conversation with William Campbell in which he told Mr. Campbell that he was

coming over there pretty soon to do some work on the placer claim, that he wants to ask him just what William Grant did tell him on the subject of the work. Mr. Stevens asks if it was May 1921, and Mr. Roth says it was May 11, 1921. Mr. Stevens makes no further objection.)

A He just asked me what Joe Quigley was doing. I told him "monkeying around" and he wanted to know if he had uncovered any money, and I said I didn't know whether he did or not. He said he could just as well let Tom Aitken take out a few hundred—was afraid it would take all he had and wouldn't be able to get any other sucker to come in and take it up—said there was nothing in that country only just on top of the ground—take out a little and couldn't find any more—contended the country was no good, and it would be a long time before he would get another sucker to come and take over his property.

(Mr. Stevens moves that answer be stricken out. Court states that it is supposed to be part of the conversation and over-rules objection.)

Q With reference to your placer claim that you staked and the certificate of location which was just filed in this case—did Mr. Tobin, your co-defendant, have anything to do with that?

A No.

Q He was not interested in knowing anything about it?

A No, he had nothing to do with it.

Q Where was he?

A Up Copper Mountain.



Q When he came back, did he assent to that proceeding or repudiate it?

(Mr. Stevens makes objection on the ground of not being proper cross-examination. Court rules that it may be admitted. Exception taken and allowed.)

Q When Tobin got back, or when Tobin first heard that you had located that placer, or undertook to locate a placer, what did Tobin say about it?

(Mr. Stevens enters objection which is over-ruled. Exception taken and allowed.)

A He told me I didn't want to pay any attention to what they told me—it was no good in the first place, and they were just trying to 'job' me.

(Mr. Stevens asks that answer be stricken out as not having anything whatsoever to do with this case Court orders it stricken out and instructs jury to not pay any attention to the answer.)

Q The question I asked is this—and please try and answer the question, if you can—did Mr. Tobin when he found out you had located , or undertaken to locate a placer, did he repudiate your action?

(Mr. Stevens objects to question as suggestive and leading. Court over-rules objection. Exception taken and allowed.)

A He didn't agree with it at all.

Q How did you come to locate it?

(Mr. Stevens objects to question on the ground that it is immaterial why he did it. Objection sustained.)

Q Mr. Stevens asked if you saw O. M. Grant when he was working there' which reminded me



that O. M. Grant—you heard O. M. Grant's testimony with reference to the conversation you had with him when he was working there, didn't you?

A Yes, I remember.

Q I will ask you to state whether or not in any conversation you had with Grant down there that you told him or indicated that you would jump his placer claim if he didn't do the assessment work?

A No sir.

Q He was doing assessment work when you talked with him?

A Yes.

MR. ROTH: That is all.

### **Re-Cross Examination**

BY MR. STEVENS:

Q Mr. Campbell, to refresh your memory—when O. M. Grant was eating his lunch, during the time he was doing assessment work—didn't you see him some place eating lunch?

A I did.

Q Did you not in a joking way say to O. M. Grant in substance that, "you better go on doing assessment work or I will jump your claim"?

A No sir, I did not.

Q You knew he was working there on the claim—on this placer claim?

A Immediately after that—I didn't know it that day.

Q But you saw him working there on this placer ground—Billy Grant's claim?

A I did after I saw him sinking holes.

Q A long time before you and Tobin went on the ground?

A I saw him about the 11th or 12th of November.

Q 1920?

A Yes sir.

Q And you knew at that time he was doing assessment work for William Grant, the plaintiff in this case?

A I knew he was working for Tom Aitken for a long time—he told me of all the work he had done, he had represented six claims for Tom Aitken. I knew Billy Grant staked a claim for a mill site.

Q I will ask you to state whether or not you knew at that time that either Billy Grant or Tom Aitken or somebody else had staked it for placer.

A Yes sir, along about the 10th of the month.

MR. STEVENS: That is all.

MR. ROTH: That is all.

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J. L. TOBIN, one of the defendants, called as witness in his own behalf, being duly sworn, testified:

### **Direct Examination**

BY MR. ROTH:

Q What is your name?

A J. L. Tobin.

Q You are one of the defendants?

A I am.

Q Are you acquainted with William Grant?

A Yes sir.

Q Are you acquainted with Tom Aitken?

A Yes sir.

Q Did you go into the Kantishna district in the year 1919?

A Yes, I did.

Q In what capacity did you go in there?

A Working for Aitken part of the time and on the Government road in the early part.

Q Going from Fairbanks—at whose instance did you go to the Kantishna?

A Mr. James Haney.

Q What capacity was Mr. James Haney occupying with reference to your employ?

A He was in charge of everything as I understood at that time—and Mr. Aitken had some interest along in this property—this quartz mining property, known as Quigley Hill.

Q With Aitken?

A Yes sir.

Q What time did you leave Fairbanks?

A The 28th day of May.

Q Did William Grant go at the same time?

A Yes sir.

Q How did you go?

A We went by boat from here to Roosevelt.

Q The boat left right from Fairbanks?

A Yes sir.

Q What boat?

A Charlie McGonigle's launch—I don't know the name of the boat.

Q What time did you get to Roosevelt?

A To the best of my knowledge, it was the 2nd day of June.

Q What was immediately done there after you got to Roosevelt?

A We had some supplies there that were cached, and I stopped there a couple of days after Grant and the others had gone up to the mine to put up the cache.

Q Have you a trade?

A Yes sir.

Q What is it?

A Carpenter.

Q Before I proceed—I forgot to ask you about this map. I refer to map or plat on the wall which has been introduced in evidence and marked “Defendants’ Exhibit No. “2”. I will ask you to state whether or not you had anything to do with the making of that map.

A Yes, I did.

Q Where did you get the data from which you made the map?

A Measuring of the ground.

Q Have you such experience that will enable you to make a plat like that from measurements?

A Yes sir, it is nothing but measurements.

Q How did you arrive at the angles that are contained within that figure there that is bounded by heavy blue lines?

A Square .

Q Measurement in square?

A Yes sir, roughly—just measurement.

Q Did you take any of it off from this plat that has been filed here by the plaintiff?

A No sir, I never measured any part of this fake map.

MR STEVENS: What?

A Fake map.

MR. STEVENS: Which do you mean?

A Your map.

MR. STEVENS: You mean this map marked "Plaintiff's Exhibit A" is a fake map.

A Yes sir.

BY MR. ROTH:

A What is the scale?

A Four inches to 100 feet.

Q How were those measurements procured that you have made on that plat which is Plaintiff's No. 2—I mean Defendants' No. 2?

A How I come by them?

Q Yes.

A I measured the ground known as the Hillside Bench, the Silver King Lode Mining Claim, and the Red Top—which I measured on the 20th day of January 1922.

Q Who took part in the measuring?

A Joe Dalton and William Campbell.

Q And yourself?

A Yes sir.

Q At what point did you start in your measurements of that Hill Bench Placer Claim?

A At the southwesterly corner.

Q What did you find at that corner which was representative of the corner of that placer claim?

A Found a post there.

Q What was written on the post?



A Well, to the best of my knowledge it was "William Grant." I wouldn't be positive there was any more on that stake—it was very faint—very ancient—on an old post.

Q Just describe the post to the jury the best you can.

A It was an old looking stake—weather-beaten—about four inches square.

Q What kind of wood?

A Cottonwood. It stood about three or four feet tall—probably three or three and a half feet—I don't know of anything else.

Q What was the appearance of the wood in that stake at that time?

A It was old and dark colored.

Q Was it such that a lead pencil would make legible writing on it?

A It should if it ever had been put there—probably not very plain.

Q What was the first distance that you got in measuring that placer claim?

A I measured this westerly line running from the southwest corner to the northwest corner.

Q You mean the lower side line of that placer claim?

A Yes sir.

Q That has been designated as the southerly line—it is really the southwesterly side line, but referred to by both sides as the southerly line—so long as we understand. What distance did you find?

A 1395 feet.

Q What is the condition of the surface over which you measured?

A It is fairly level—a little uneven.

Q What kind of measure did you use?

A Surveyor's tape.

Q What material is that composed of?

A The tape?

Q Yes.

A It is considered to be very accurate—I don't know what material.

Q Is it cloth or steel?

A It is called a steel tape, to the best of my knowledge.

Q What did you find at the southeasterly corner of that placer?

A A stake.

Q What kind of a stake?

A Cottonwood—an old stake—might be 3½ feet tall.

Q How was it—was it standing straight?

A It leaned.

Q Which way?

A Am not right sure.

Q Do you remember how much it leaned?

A Quite a bit—it was very much out of plumb.

Q Did you see anything written on that stake?

A I think I saw William Grant's name.

Q Anything else?

A No—I don't remember whether there was an arrow on it or not.

Q From there where did you measure, if any where?

A Measured on up the hill 605 feet to the next stake.

Q That would be as we have designated it the northeasterly stake?

A Yes sir.

Q What did you find at that corner?

A A stake.

Q What kind of a stake?

A A stake—it might be three inches square, possibly a little more. A new stake.

Q What was written on that?

A The letters "N. E." as I remember, and "Hill-side Bench Claim. Locator William Grant." It was very easy to read.

Q Very easily read?

A Yes sir.

Q Was it the northeast corner?

A To the best of my knowledge—the northeast corner.

Q Did it have a number on it?

A No sir.

Q Did you see any more than one stake there?

A No sir.

Q How was that stake supported?

A I believe it was in the ground.

Q Was it tied to a bush?

A No sir.

Q Were there any bushes in that vicinity?

A No, not very close anyway.

Q From there, where did you measure?

A The upper side line of the Hill Bench to another stake above the Quigley mansion.

Q That corner is designated as the northwesterly corner?

A Yes sir.

Q What distance did you find there?

A 1296 feet.

Q What did you find at that corner?

A A small stake stuck up in a pile of rocks.

Q What kind of a stake?

A As I remember—a spruce stake.

Q What size?

A Probably  $2\frac{1}{2}$  inches square—nearly square—faced on four sides, but not quite square. It may have been two or two and a half inches.

Q What was written?

A I saw on one side, "I claim 1500 ft. straight up by 1500 ft. straight down" with arrows.

Q Was there any signature?

A Yes.

Q What was it?

A I don't remember whether it was "Shorty Gegan" or "Alex Gegan."

Q What else was on that stake?

A I saw on the other side of the stake William Grant's name and think it said "Hillside Bench"—and an arrow pointing to the so-called initial post.

Q Were there any figures on it at all?

A Absolutely no figures.

Q Was it numbered?

A No sir—if it was, I couldn't find it.

Q Now with reference to those square marks on this plat towards the top of the map from what is marked "Q's tunnel"—what do they represent?

A Quigley's discovery on the ledge and other prospects along the line down to his tunnel.

Q Were measurements made between those points?

A Were they measured?

Q Yes.

A No.

Q Are they estimated?

A Just estimated approximately.

Q The tunnel itself, is it put where it is by measurement?

A Yes sir.

Q From where ?

A From the lower side line of the so-called Hillside Bench and measured on up to the upper line of the so-called Hillside Bench.

Q And what does this figure, "165 ft."—what does that represent?

A That is from the lower end of Quigley's property—the Red Top Lode Claim—to the ledge in the tunnel.

Q And what does that "25 ft." represent?

A From the center of Tobin and Campbell's shaft to the Quigley line.

Q And that "Q's cabin"—what does that represent?

A Quigley's cabin that he lives in.

Q What does that "Q's shop" represent?

A The blacksmith shop—Quigley's.

Q Now I will go back to where I left you before. You got to Roosevelt about the 2nd day of June?

A Yes sir—1919.



Q And how long did you remain at Roosevelt?

A To the best of my knowledge—two days, or possibly three days.

Q What did the plaintiff, William Grant, and Haney and the rest of the folks that were along do, if you know?

(Mr. Stevens enters objection. Objection sustained.)

Q What kind of an outfit was taken in from Roosevelt with them?

A With reference to supplies, you mean?

Q Yes, everything they took in that you know of from Roosevelt.

A At that trip, or during the summer?

Q At that trip—that they took in from Roosevelt.

A They didn't take hardly anything.

Q What did they have to take it with?

A Two little horses.

Q That is all they had?

A Yes sir.

Q What was the condition of the roads at that time?

A There wasn't any—no bridges.

Q What next did you do after that?

A Was cutting right of way for pack horses to get through to the mine.

Q How long were you engaged in that work?

A One month—thirty days.

Q After that, where did you go?

A Half way between Roosevelt and the mine Mr. Haney came down on the way to Roosevelt—could get nobody to use cayoooses but me as he supposed

and asked me if I would run the horses and get some supplies up from Roosevelt—which I did and went back to Roosevelt and got what little they might pack.

Q How many trips did you make?

A Am not positive—one or two.

Q After that, what did you do?

A After I got through with packing horses?

Q Yes.

A I worked at the mine up on this hill—Friday Creek—the Aitken mine.

Q Under whom were you working?

A William Grant.

Q Where were you sleeping at that time?

A At Mr. Quigley's.

Q On the 10th day of September 1919, what was there at the mine—the Quigley mine—in the shape of a bunkhouse?

A There was none.

Q What was there in the shape of a bunk tent?

A There was a bunk tent—one man could sleep in it—two or three in a pinch.

Q What was there in the shape of an assay office at that time?

A There was Mr. Albert Johnson—he had a little tent for assaying—what assaying was done—might be an 8 x 10 tent—room for one man with a stove.

Q What did they have in the way of tools?

A They didn't have any.

Q Where did they get the tools you worked with?

A Understand they borrowed from Mr. Quigley and others wherever they might borrow them.

Q Did you know of Mr. Grant doing any prospecting down on this—what is now known as the Hillside Bench Claim?

A I never heard of it.

Q On the 11th day of May 1921, where were you living?

A Was living on what is known as the Silver King Lode Claim at the mouth of Friday Creek.

Q On that day did you do anything at all towards locating the Silver King Lode Claim?

A Put up prospector's stake on the 11th day of May 1921.

Q Do you know Harry Owen?

A Yes sir.

Q Do you know Broker?

A Yes sir.

Q With reference to the 11th day of May 1921, the day you say you set up prospector's stake or post—did you with reference to that day—when, if at all, did you see those two men together?

A Harry Owen and Mr. Broker?

Q Yes.

A To the best of my knowledge, it was the day before—it would be the 10th.

Q Where did you see them?

A I saw Mr. Broker at Dalton's cabin at Eureka Creek first.

Q What did you do after the 11th day of May 1921 with reference to locating the Star King Lode Claim?

A You mean the Silver King.

Q I mean the Silver King, yes.

A I didn't stake it for some time afterwards.

Q What did you do with reference to locating on the ground?

A Started to work there about the 22nd day of May.

Q Where did you go to work?

A Where the shaft was sunk—about 25 ft. below Quigley's line of the Red Top.

Q What is it marked on the plat?

A "C. & T. Shaft."

Q When you started to work there, did you start a new hole or go to work in a hole that O. M. Grant had sunk?

A We started a new hole.

Q Did you ever go in a hole O. M. Grant had started?

A How do you mean 'go in'?

Q I mean go in and work in it?

A No sir—I was in one he sunk, or he is supposed to have sunk, but never did any work.

Q Who were there present at the time you started your discovery shaft?

A Mr. Joe Quigley, William Campbell, and John Busia was occasionally present, working for Quigley a few feet away—he wasn't down at the shaft, as I remember.

Q How deep did you go in the shaft the first day—about how deep the first day?

A Not very deep—did some blasting—the powder we took we used it and don't think we took any more powder back—conflicted with a little water, and



whether we did very much blasting the first day, I wouldn't say.

Q How far down did you get into the ground the first day?

A Probably not more than a couple of feet—it was late when we started, as I remember, and I wasn't very strong on work—had just got over the flu, or what was supposed to be the flu.

Q You were weak?

A I wasn't very weak and I wasn't very strong.

Q How did you proceed with that work?

A We blasted out the frozen ground.

Q How did you get the powder in?

A Used a drill auger or bull pick—drove it in the ground and then blasted it out.

Q How much powder did you use in a charge?

A Not very much. Sometimes the bull pick we couldn't drive clear down and had to drive back with the ring that was on the end—had to leave space for the hammer to work between the ground and the ring—not very deep. Sometimes we used one stick and sometimes two—it all depended.

Q Why did you use powder?

A It was the quickest and easiest way to do it.

Q Was it because the ground was frozen?

A Surely.

Q How deep?

A I don't know that I ever measured—approximately 5 ft., it might have been a little more.

Q You say you encountered some water—just explain.

A A little water in one corner of the shaft—a lit-



the stringer of rock, or slide rock—a little narrow thing went down in the ground a couple of feet and water had gone down, I don't know how deep, anyway a couple of feet, and in order to stop this, we shifted to one side from where it would be, to the other side probably a couple of feet and filled this place where the water was coming—filled it with moss—mossy sod—a little bunch of sod, and tamped it in and then proceeded, I believe the next day or couple of days we worked a little every day on this.

Q How deep did you get before you put on the windlass?

A It might have been—don't believe we measured—am sure it wasn't, probably seven or eight feet—it might have been a little more, but doubt it. There couldn't only one man work in the shaft and I remember we put the windlass on probably a little sooner than we needed to.

Q What were the dimensions of that shaft?

A At the top it might have been three and one-half feet. I know we had to put in a little cribbing to stop the dirt so we could put a little moss and sod in to stop the water coming in.

Q Three and one-half feet is one dimension, and what was the other?

A The first cribbing might have been 6 ft. long, that is, the inside of the cribbing—believed we nailed them together—they were fairly small—had to pack them up the hillside and didn't pack anything larger than we had to to hold the moss and sod back—we probably cribbed it a couple of feet down—don't know that it was any more than that.

Q While you were at work there, did you see Harry Owen there?

A Yes, he came a few days after we started—I don't remember how many days.

Q How deep in the shaft were you when he came, as you recollect?

A Probably ten or twelve feet deep—I was talking to him and I was down in the shaft when he came along.

Q What was the conversation about, do you remember, at the time?

A Well no, I don't know as I could say the conversation—we had found some little float in the shaft up to this time—don't remember whether we had found it just this day or not.

Q Was there anything said to him about the float?

A I remember there being something said.

Q What was it?

A I couldn't say—just showed him this rock—Mr. Campbell showed him some little float we had dug up at that time.

Q Now, near this shaft you had started, was there another hole?

A There was.

Q What direction from the shaft? Standing at your shaft and looking towards Quigley's tunnel, which side would it be on?

A On the right—probably twelve feet away, approximately.

Q Would it be—(interrupted)

A Up Moose Creek.

Q —would it be nearer your upper end line than your shaft or farther away?

A It might have been down hill along the ledge a couple of feet farther than our shaft.

Q What was the condition of that hole when you started your discovery shaft?

A It was sloughing in—there was considerable water in it—don't remember whether it was full or lots of water.

Q How big a hole was it on the surface at that time?

A The surface was caving in—it might have been six feet wide, and safe to say, seven or eight feet long—the water was still seeping and running in from the sod.

Q That was there when you started your shaft?

A Yes sir.

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Session 10:00 A. M., February 7, 1922

J. L. TOBIN, one of the defendants, called as witness in his own behalf, being heretofore sworn, testified:

**Direct Examination—Continued**

BY MR. ROTH:

Q Did you continue that work without interruption—or how long did you continue that work without interruption—until what depth?

A About 48 ft.

Q What were you in when you quit work in that shaft?

A Rock

Q What kind of rock?

A Quartz—mineral rock.

Q What kind of rock is that classed?

A Gold—Silver—

Q You don't quite understand—was it in a vein or lode?

A A vein.

Q Did you see a wall?

A Yes.

Q Now which way did the wall run?

A I couldn't tell quite exactly —only a little wall on one side of the shaft, or rather on the end of the shaft.

Q Did you see any mineral in any of that rock?

A Yes sir.

Q What did you see?

A Silver.

Q How did you see silver?

A Well, I could tell silver in the rock.

Q Did you pan any of it?

A I did pan some but most of it was hard rock—decomposed ledge.

Q Did you see silver in any of your pannings?

A No sir.

Q How did you come to select that place to sink?

(Mr. Stevens makes objection on the ground of being immaterial, incompetent and irrelevant. Objection over-ruled. Exception taken and allowed.)

Q How did you come to select that place to sink?



A Well, I had a line of the ledge by Mr. Quigley's holes that had been sunk on the same ledge, and Mr. Quigley and I talked it over what line—about where I should most likely hit this ledge on this so-known Silver King Lode Claim.

Q Now you said you saw Harry Owen when in that shaft?

A Yes sir.

Q What depth did you say you were in the shaft when you saw him?

A Ten or twelve feet, about.

Q How did you come to know it was that depth?

A Mr. Owen came to the shaft and talked about some prospect he had just discovered up Eldorado Creek somewhere on some ledge, and he had some samples with him and he tossed down a few to me and asked me to look at them, and asked what I thought of them. When I got through looking I told him I thought they looked very good and tossed them back up to him.

Q He didn't send them down in a bucket?

A No sir.

Q Did you make a trip to Roosevelt before you got to the bottom of that hole?

A No sir.

Q Did you while working in the shaft?

A Yes sir.

Q When was it you made a trip to Roosevelt?

A On the 15th day of June, 1921—I didn't get quite to Roosevelt that night—within a couple of miles—slept by a camp fire, and the next morning, the 16th of June, I got there.



Q Did you see the plaintiff, William Grant, at Roosevelt?

A I did.

Q What was your business with him, if any?

A I went down to buy cayooses of Aitken.

Q Did he say anything about you prospecting on this ground?

A Yes.

Q What did he say?

A He says, "I heard you struck it pretty good,"—or rich, I wouldn't be sure about the exact word—I says, "We have a good prospect" and he says, "I understand you sunk in one of my holes."

Q What did you say?

A I said, "No, I did not."

Q Was there anything else said?

A Nothing concerning this ground—we talked about the neighbors and others—Mr. Miller stood by.

Q What Mr. Miller?

A Known as 'Cow' Miller.

Q H. I. Miller?

A Yes sir.

Q At that time did William Grant complain in any way about your working on this placer claim?

(Mr. Stevens makes objection on the ground that question calls for conclusion of the witness. Court sustains objection and states that witness may be asked what was said.)

Q Did William Grant say anything further with reference to your working on that ground?

A No sir.

Q When did you next see William Grant?

A About the 23rd of June, to the best of my knowledge. I haven't it down—I wouldn't be positive of the date.

Q Where were you at the time you saw him—where did you meet him or see him?

A I saw him on this Silver King Lode Claim—we were living on this and as he came along, I and Mr. Campbell and Mr. Joe Dalton were there together doing some work on our cache where we kept supplies and groceries in.

Q Did you have any conversation with Mr. William Grant at that time?

A No sir.

Q Did he pass the time of day?

A No sir, not to me.

Q How close were you to him?

A It might have been 100 ft. and might have been a little more.

Q Who was with him, if you know?

A Mr. John Biglow.

Q What occurred at that time?

A Mr. Grant spoke to Mr. Dalton—hollered, "Hello, Joe" and Mr. Dalton went on over to where they were standing on the trail going on up to Mr. Quigley's, and Mr. Grant introduced Mr. Biglow to Mr. Dalton. There was nothing else that I know of. They went on up to Mr. Quigley's.

Q When was the next time after that that you saw Mr. Grant, Mr. William Grant?

A Well, I think the first time I was talking to him—(interrupted)

Q No, I am not talking about that—did you see him the next day?

A No, I don't believe I saw him, but I know he was there—I heard the wagon go by.

Q Where were you?

A I was down at the garden, probably a quarter of a mile, doing work along about noon time when he drove by on the road—I couldn't see for the brush, but I thought in my own mind it was him.

Q When did you see him again?

A The next time I saw him was the 3rd of July.

Q Where was that?

A On Moose Creek, on the lower end of the Silver King Lode Claim—I went down to catch the mail wagon.

Q Were you at Bartlett's camp—did you ever see him at Bartlett's camp?

A I did.

Q Was that before or after the time you just mentioned now?

A After.

Q Allright, tell about this next time.

A I saw him on the 3rd day of July when he was returning with the mail from Kantishna post office to Roosevelt—I went down to give him some mail and a telegram I gave to Mr. Moody to send for me.

Q When was that?

A The morning of the 3rd of July, 1921.

Q Was anything said between you and him at that time?

A Yes.

Q What was it?

A He told me to keep off this Hillside Bench and he called me a few pretty strong names and we had a few words, of course.

Q I will ask you to state whether or not that is the first time there was any protest made about your being on the Hillside Bench.

(Mr. Stevens enters objection to the question which is over-ruled. Exception taken and allowed.)

A Yes sir.

Q And how deep—to what extent had your work gone at that time in your discovery shaft—how deep was the shaft—about? How much work had you done altogether?

A We were—I don't say we wasn't clear to the bottom of 48 ft.—it might have been 44 ft. We were down in the ledge at this time, but just exactly what depth, I couldn't say.

Q What work on the shaft, if any, besides that in the way of timbering?

A We had timbered down about 15 ft.—all the timber we had there to use.

Q Did you have a talk with Harry Owen on Eldorado Creek?

A I did talk with him a few minutes.

Q When?

A I don't know what date—it was in the fall as there was considerable snow on the ground—it was the day before I and Mr. Campbell left Kantishna to come by way of Highway Pass to the railroad.

Q Was anything said between you and him on the subject of your going into another hole to work at that time?



A Yes, there was.

Q What was it?

A He said something about—I don't remember just the exact words—about it was kind of bad about sinking in this hole. I said, "If we did go down in the hole, what of that in this case?" I led him to believe we did go in an old hole, but I didn't say it was Grant's hole.

(Mr. Stevens enters objection to the answer and objection is sustained.)

Q After the 3rd of July, when was the next time you saw William Grant?

A I don't know that I saw him the next trip—I don't just remember now—he returned about possibly the 10th of July to Eureka post office.

Q I am asking when you next saw him yourself.

A To the best of my knowledge, it was the fourth trip I saw him at Bartlett's—we were down in the woods about seven miles from Friday Creek.

Q How long were you in his company there?

A Well, a good part of the evening and over night—we stopped over night in the same building—we were stopping to cut mining timber for a hydraulic plant moving into the Kantishna.

Q Did anything pass between you and Mr. William Grant at that time?

A No sir.

Q Or between Mr. William Grant and Mr. Campbell in your presence?

A Nothing whatever, that I know of.

Q Who else was there?

A Hansen—Einar Hansen I believe is his name



—was traveling with Grant.

Q When was the next time that you saw Mr. William Grant?

A Well, about a couple of days before this trouble on the ground—probably about the 23rd of July—maybe the 22nd.

Q Where did you see him at that time?

A I saw him on the ground—believe he was hauling some wood.

Q Did he speak to you at that time?

A No sir.

Q Did you see any of that difficulty between him and William Campbell on the surface of the ground at that time?

A No sir, I was in the shaft—down in the shaft.

Q Did you hear any of it from where you were?

A Well, very few words.

Q When did you first observe the trespass notices? spoken of, on the ground there?

A Something about the early few days of July, to the best of my knowledge.

Q With reference to this time he told you to keep off—when was it you saw him?

A The 3rd of July.

Q When was it you saw the notices, with reference to that day?

A A few days before.

Q 'A few days' means nearly anything.

A I don't know the date.

Q I am not asking the date—was it as many as ten days before?

A I said the first few days of July—probably the

first or second of July.

Q Did you say that you never read the notice?

A I said so, yes.

Q So you don't know what was in the notice?

A No I don't—I knew they were there.

Q Did you ever tear down any of those notices?

A No sir.

Q Mr. Tobin, I want to go back to November 1920, and ask you to state, if you know, between—whether between the 3rd day of November 1920 and, say the day you set the stake, the first stake on this claim, which would be the 11th day of May 1921—if there could have been men hired on that ground to help sink a hole to bed-rock?

A Yes sir.

Q How do you know?

A I know they could have gotten me, for one.

Q Were there times that you were unemployed?

A Yes sir. I helped Mr. Quigley whenever he needed me.

Q I will ask you to state whether or not at the time that you set the first stake on this ground and started work there, if that was a well known lode?

(Mr. Stevens objects to question as calling for a conclusion of the witness. Objection over-ruled. Exception taken and allowed.)

A It was.

Q I will ask you to state whether or not that lode was discussed generally in the community there—among the people of the community.

A Yes sir.

Q I will ask you to state whether or not that lode

was well known to exist in that community south of the southerly—of this blue line on this map, which represents the northerly line of the Hillside Bench Claim.

(Mr. Stevens enters objection on the same ground as the last objection. Same is over-ruled. Exception taken and allowed.)

A Yes sir.

Q I will ask you to state whether or not that also was generally discussed among the people of that community?

A Yes sir.

Q Prior to the time you started to sink this discovery shaft, I will ask you to state whether or not you had been inside of Quigley's tunnel.

A Yes sir, many times.

Q How deep was that tunnel driven before you started to work?

A I don't remember just exactly—probably 100 or 125 feet—might have been more or less.

Q About the 10th day of May, 1921, did you see Harry Owen?

A Yes, I did.

Q Are you acquainted with a man by the name of Ed Broker?

A Yes sir.

Q Did you see him also about the 10th day of May 1921?

A Yes sir.

Q Where?

A I saw him first at Dalton's cabin at Eureka Creek.

Q Where did you first see Owen on that day?

A I met him at Friday about the line of the Silver King Lode Claim—Mr. Broker and he came down from Eureka together—Mr. Owen was there with a dog team and stopped and talked.

Q Indicate on that plat about where you stopped and talked.

A Somewhere along this line. (Indicating)

Q Which line is that—the easterly line of the Silver King?

A This line—the southeasterly or easterly.

Q Did you travel together from there—the three of you?

A We walked over as far as where the range was that belonged to Mr. Broker.

Q Where did you walk?

A Over here on the Silver King near the center of this ground—(Indicating on map.)

Q At that time and place, did Mr. Owen say, "Here is where that ledge comes down"?

A Yes, he said "ledge" or "lode."

Q Just state which way he was looking or if he pointed any way at the time.

A He looked up hill—I supposed from the conversation that he meant this ledge—there was no other that I know of.

Q Were the holes of Quigley's in sight there as well as the tunnel?

A The holes were in sight, but I wouldn't be positive of the tunnel from where we stood.

Q With reference to those holes—where was Harry Owen standing at that time?



A Nearly in line—nearly in the center of this Silver King.

Q Did Mr. Broker say anything?

A No, he did not—not a word.

Q Was anything else said?

A No sir, that was every word said regarding this ledge or lode that he mentioned.

Q Did you do anything as a result of that conversation?

A Yes, the next morning, I remember.

Q What?

A I went and staked this ground—put out a prospector's stake.

Q I will ask you to state if you had been figuring on staking that before.

A Yes, a long time.

Q Why hadn't you started before?

(Mr. Stevens enters objection and Mr. Roth agrees to withdraw question.)

Q Do you know who was bookkeeper over there at Tom Aitken's mine on the 10th day of November 1920?

A To the best of my knowledge, I do.

Q Did you have any dealings yourself with the bookkeeper about that time?

A I couldn't say that I did—personally.

Q Mr. Tobin, did you have anything to do with the location or attempted location, of a placer claim covering any part of this ground at any time?

A No sir, absolutely none—I was not there.

Q Did you ever at any time give your consent to the location or attempted location, of any placer



claim there?

(Mr. Stevens enters objection to question as calling for conclusion of the witness. Objection overruled. Exception taken and allowed.)

A No, I never did.

Q After you heard that such an attempt had been made, did you do anything with reference to it at all?

A Yes, I went to the recording office—Mr. Wilson, at Eureka, to get—to see what I might do. He informed me I couldn't do anything and believed it was best—(interrupted)

(Mr. Stevens objects to witness answering further on account of being immaterial. Objection sustained.)

Q Is there something else I haven't asked you?

A Yes, there might be something.

(Mr. Roth asks permission to speak to witness and Court grants it.)

MR. ROTH: You may cross-examine witness.

### **Cross-Examination**

BY MR. STEVENS:

Q Mr. Tobin, you stated I believe that you went to the Kantishna country from Fairbanks and left here about May 28, 1919?

A I did.

Q And you hired out to Aitken here in Fairbanks before you left?

A I hired out to Mr. James Haney, known at his time to be a partner of Aitken.

Q You knew that at the time, that Haney was

going there to work for Aitken?

A Yes, that's what he told me.

Q Did he work for Aitken immediately upon arrival there—I mean Haney?

A I suppose he did.

Q Don't suppose—don't you know whether he did—so far as you know?

A I was just telling you I didn't go up to the mine just then.

Q Did you see Haney upon landing there do anything with reference to Aitken's outfit?

A I don't know whether it was for Aitken or the Commission.

Q Isn't it true, at the time Haney left Fairbanks he went there for the Road Commission and not Aitken—under the direction of Bobby Sheldon?

A Solely for the Commission, you mean?

Q I didn't ask solely—don't you know whether or not that Haney left Fairbanks and went to that country for the Alaska Road Commission?

A We understood he went for both—he was a partner with Aitken.

Q How do you know?

A He told me he had an interest with Aitken in this property known as Quigley Hill—an interest as I understand.

Q That was hearsay—you understood he was a partner of Aitken?

A Yes.

Q You also understand he went for the Alaska Road Commission?

A That was included as far as I understood.

Q When you left here, you left expecting to work for Haney, didn't you?

A To work on the road and then go to work in the mine.

Q You worked on the road under the supervision of Haney for the Road Commission?

A I worked under Haney one month, to the best of my knowledge, on the road.

Q And you got your pay from the Government, did you not?

A I did, as I remember—I did.

Q Not from Aitken, or not from Grant?

A No—for the month.

Q In other words, the first month in the Kan-tishna you worked for the Road Commission?

A Yes sir, as I understand it.

Q Your time was all taken up with the Road Commission?

A For the month.

Q You didn't pay any particular attention to the Aitken business at that time—that first month?

A Well, I was cutting out a right of way for Aitken's horses to get from Roosevelt to the mine—that was our work—building bridges.

Q You saw the map that has been introduced as plaintiff's Exhibit "A" before you started to make your map, which is Defendants' Exhibit "2"—you didn't start making your map until Plaintiff's Exhibit "A" was introduced in evidence?

A No.

Q Didn't you come up to the board and look at it the first day?

A Not any closer than others standing in front.

Q Didn't you and Mr. Campbell, or Mr. Roth?

A Not very close.

Q Before you started making your map?

A It was before.

Q Now you stated here yesterday something in regard to plaintiff's Exhibit "A", and called it a fake map—did you not?

A Yes sir.

Q In what particulars is the map called Plaintiff's Exhibit "A" incorrect, if at all?

A It has got a fake line, for one thing.

Q You state we have a fake line on there—what line do you refer to on plaintiff's Exhibit "A"?

A You established 660 ft. post called No. 5—as I understand—corner No. 5.

Q Where is the line you say is a fake line—between what points?

A I believe this is what it says "corner No. 5."

Q Which is the line you say is a fake line?

A This line is not on this ground. (Indicating on map.)

Q Do you mean the line as drawn from where it says "corner No. 5" to corner No. 3 post?

A Yes sir.

Q That is the line you say is fake?

A I do.

Q Why do you call it fake?

A Because there is no line and no post there.

Q You have been in Court, haven't you, ever since this trial began?

A Yes sir.



Q You heard the testimony of Mr. Friedrich who made this line, did you not? And he stated that there was no post at corner No. 5?

A He said 'a peg'.

Q That he put there—don't argue, answer the questions and answer fairly—you heard Friedrich's testimony that he put that peg there, did you not?

A I did.

Q You heard Friedrich say he measured 660 ft. up along this end line from initial post to reach that place where he set his instrument at corner No. 5, didn't you?

A Yes sir.

Q And that from there he took measurement over here to corner post No. 3?

(Mr. Roth objects to question as incompetent, as he states Friedrich said he did it by triangulation. Objection over-ruled.

A I couldn't say I did.

Q You didn't hear anyone pretend—counsel or any witness—you didn't hear anyone pretend that Grant had ever put a stake there at what is designated as corner No. 5?

A No, I couldn't say I did.

Q Is that all you have to say about that particular line?

A If you might ask more, I will tell you more.

Q Have you any other objections to that line than what you state?

A I couldn't say that I have—I only called it a fake line, which I contend it is.

Q It was put there to illustrate the area of the



Hillside Bench from a line which is 660 ft. above the initial stake, which is according to the location certificate. You have just pointed to corner post No. 4, haven't you?

A You call it corner No. 4.

Q That is the place you just pointed?

A Yes.

Q You said that is our stake?

A I believe so too.

Q I believe so too. Now, that is the stake you understand that Mr. Grant, the plaintiff, placed there when the claim was originally located?

A I guess that is the one—the only one.

Q You saw some stakes down hill at the initial place?

A I saw Hamilton's.

Q You saw some writing on one side?

A I did.

Q You saw an old stake over here at the south-east corner?

A Yes.

Q And that was what stake?

A Hamilton's stake.

Q You saw some writing on the inside of that, didn't you?

A I think I saw William Grant's name on it.

Q You have already testified concerning this stake?

A Yes.

Q In what other respect do you claim that is a

fake map—referring to Plaintiff's Exhibit "A"?

A I couldn't say anything other—anything more than the fake line.

Q Now between your measurements and ours—there is some differences between your measurements and those indicated on here?

A There certainly is.

Q You do not pretend that the angles of your map are correct?

A I am not posing as an engineer.

Q I didn't ask that—I asked if you pretended that any of the angles of your map are correct?

A No, I don't—quite—they are near enough for me.

Q As you have indicated on your map in blue lines the length of each line—the end lines and side lines—are you able to state the number of acres in the area?

A No sir, I didn't figure it.

Q You never calculated it. The only difference between the measurements you made and the measurements on Plaintiff's Exhibit "A"—yours seem to be a few feet shorter on each line, is that right?

A Quite a few feet.

Q Well, how many? The northerly side line of this blue claim—blue marking—is 1296 feet, according to your measurements, isn't it?

A Yes.

Q And it is 4 feet longer according to Plaintiff's Exhibit "A"—that is true?

A I don't know.

Q Look at it and see. It says, "1300 feet". And

the lower side line you have 1395 feet and Exhibit "A" of Plaintiff's has it 1400 ft. and 8 inches, that is a difference of 5ft. and a fraction. Now the end line on your map is 605 ft., whereas, on Plaintiff's Exhibit "A" it is 616 ft. That is a difference of 11ft. That is true, isn't it?

A Yes.

Q On Plaintiff's Exhibit "A" the distance between initial post and post No. 4 is 696 ft. and yours is 778 ft.—no, on Plaintiff's Exhibit "A" it is 796 ft., which is a difference of about 20 ft.

A Quite a difference.

Q Well, it is a difference of 20 ft. You don't pretend to be a surveyor?

A I said so, yes.

Q The ground along the upper side line there is quite rough, is it not, and hard to travel across?

A It is rough and a steep mountainside.

Q Rough too?

A Not very—just steep.

Q It was more difficult to measure that than if smooth ground?

A Not much.

Q A part of the distance between initial stake and the northwest corner—part of that is pretty rough, isn't it?

A Steep.

Q In your direct examination, in answer to some of Mr. Roth's questions, you described what you saw on these various four corner stakes of Grant's, and that was, as I understand, what you saw in January of this year, was it not?

A Yes, I saw them then.

Q Did you ever see any of the writings on this corner—and I refer to the lower left hand corner of Defendants' Exhibit "2"—prior to the time that you entered upon the ground that you afterwards located?

A Did I ever see anything prior to that time?

Q Did you ever see that stake that is referred to as Grant's initial stake?

A Prior to the time?

Q Yes.

A Yes, I saw it in the distance.

Q Did you ever get up close enough to examine it?

A Prior to that time—no.

Q Did you ever see the up-hill—it would be the northwest corner of this placer claim prior to the time you entered on the ground you afterwards located as the Silver King?

A Only in the distance.

Q But never examined it?

A No.

Q Did you ever see the southeast corner referred to as corner No. 2 of Grant's placer, prior to the time you entered on the ground that you afterwards claim to have located as the Silver King Lode?

A Yes sir.

Q Did you examine it?

A I did not have no occasion to.

Q You didn't see what was written on there, if anything, prior to the time you entered on the ground?

A No sir.

Q And is that same true in regard to the north-easterly—you never saw that prior to the time you entered on the ground for the purpose of locating the Silver King?

A No, I didn't—or anybody else.

COURT: I think you should confine yourself to what you know yourself.

Q I asked you if you were there and saw the stake at that corner prior to the time you entered on what you afterwards located as the Silver King Lode.

A I was there at this corner.

Q Did you go to the Recording Office of the Kantishna Precinct and examine the records as to the lines that Grant claimed as his placer ground prior to the time you went on the ground you afterwards located as the Silver King Quartz or Lode Claim?

A No sir.

Q You never did?

A I did not.

Q How long had you lived in the vicinity of this ground before you entered upon the ground for the purpose of prospecting?

A I first went into the Kantishna in the spring of 1919—stayed that season and came out in the fall.

Q From the time you went in in 1919, up to—we will say, May 10th or May 11th, 1921—you traveled one of these roads that runs through this property from time to time?

A I did.



Q And did you work for Mr. Quigley up there at any time?

A I helped put up a building.

Q You helped put up his house?

A Yes sir.

Q And his blacksmith shop?

A Yes sir.

Q And did you work for him when he put up his other buildings—the one called the bunkhouse?

A That was built this fall—I did not.

Q And you helped Mr. Quigley build the cache?

A I did.

Q All that work you did for Mr. Quigley was prior to the time—prior to the time you entered on this ground for the purpose of prospecting?

A Yes sir.

Q Did you ever work in Quigley's tunnel?

A No.

Q But before you entered on the ground, you were familiar with the location of Quigley's discovery shaft which is indicated on your map?

A Yes sir.

Q And you knew the location of the tunnel?

A I surely did.

Q Had there been any vein or lode uncovered within the boundaries of any of the ground that you claim under your quartz location, yours and Campbell's, down hill from the mouth of Quigley's tunnel, at the time you went on the ground to prospect?

A The question is—was there any ledge uncovered below the tunnel, I understand?

Q Yes, below the mouth of Quigley's tunnel—

was any vein or lode exposed or uncovered?

A None that I know of.

Q Then you didn't know of the existence of any lode within the boundaries of what is now the Silver King Lode Claim of the defendants until you and Campbell put down your shaft and discovered that lode about the first of June, 1921, did you?

A No, I didn't know of any other.

Q You didn't know of the existence of that lode until you went down and opened it?

A I didn't see it.

Q You believed it was there, isn't it true?

A Sure, it was there.

Q Why are you sure?

A I knew it was all the way up the mountain.

Q How far up does it go up the mountain?

A About a half mile.

Q It is the same ledge? Has it been opened all the way to tell?

A It has been lined up there and opened.

Q It is on line?

A Yes sir.

Q That is all you know about it?

A It is the same kind of ore.

Q The same kind of ore and running in a straight line?

A Yes sir.

Q You believe it is the same ore?

A Pretty sure.

Q You stated that the ledge you and Campbell uncovered here is the same ledge that Quigley located?

A Yes sir.

Q How do you know?

A By the looks of the ore—the value of the ore—it is the same ledge.

Q Has it been traced—has it been located all the distance for 165 ft. above your shaft between your shaft and Quigley's tunnel—has it been opened up?

A Above the tunnel?

Q No, below the mouth of the tunnel and down to your shaft?

A No, but it is on line.

Q It is on line?

A Yes sir.

Q Do all quartz veins or lodes run in a straight line?

A I don't know.

Q How long have you been mining?

A About twenty-three years.

Q And you don't know whether quartz veins run in straight lines, or not?

A No I don't.

Q You don't pretend to know?

A No sir.

Q I thought you just now said you knew this was the same vein because it was in a straight line?

A It is in straight line, but I don't say all run in a straight line.

Q You don't know whether all veins run in a straight line?

A I don't know.

Q You don't know of veins that run—make a bend and run crooked, do you?

A No.

Q Isn't it true, the only reason that you can give for your belief that the vein that you and Campbell discovered is the same vein or lode that Quigley located, is that it is the same kind of vein matter and is in straight line, down hill with it—isn't that the only reason you can give?

A I judge from the same ore—

Q Answer my question—the reason for your belief is that it is the same kind of looking ore and in straight line?

A Yes sir—the only reason.

Q You have no other reason—or what other reason, if any?

A I don't know that I have any—I know it is in line and the same ore.

Q But you don't know whether that is a continuous vein, or not?

A Could prove it by sinking a shaft on it and prove it.

Q There is 165 feet between?

A There is no shaft between the tunnel and our shaft on the Silver King.

Q It has never been demonstrated that there is any ledge between, has it?

A No. There is plenty of ledge above to know it is the same ledge.

Q But you don't know whether it runs five feet or five miles.

A It may run forty for all I know.

Q You have claimed from your tunnel, 1470 feet, or thereabouts, down hill along the strike of the

lode, as near as can be ascertained—you did that in your location notice, didn't you?

A I believe so.

Q If you can ascertain that lodes run straight, why didn't you put in the location certificate that you claim along the lode, instead of 'as near as lode can be ascertained'? If they should run straight, why didn't you make the line straight and locate.

A Isn't it?

Q You have done so on the assumption that the lode is apt to run straight, haven't you?

A Yes sir.

Q It is liable to turn any time, isn't it?

A It might, I don't know.

Q You knew you were in about line?

A Knew I was in about the same ledge.

Q No, you don't. It might be another ledge, mightn't it?

A Well, I don't know how it could be.

Q Don't you know in almost any quartz country, especially in Alaska, that when a man starts to mine out a vein, that it frequently occurs that he loses the vein entirely?

A Oh yes.

Q You know that?

A In some cases.

Q And sometimes he runs to one side for a good many feet and finds it again. Veins are broken up, aren't they?

A Yes, but not in this case.

Q That is your opinion in this case?

A I can prove it. Every one of Mr. Quigley's



holes he sank along there he sank on the ledge, and he didn't sink to one side or the other—direct on the ledge.

Q That proves to your mind, so far as Quigley demonstrated the direction of the lode, that it runs straight?

A Yes sir, Mr. Quigley and I lined up this ledge from the tunnel and the discovery shaft and others and decided if we would sink right here we would land direct on the ledge, which we did.

Q That was because it was on a straight line?

A Yes, how could it be otherwise?

Q How far in a southerly direction along this line does the vein which you and Campbell uncovered extend?

A I just said it might extend forty miles—I am not sure.

Q I am asking you as a matter of fact, how long does it extend?

A How would I know?

Q I claim you don't know.

A I don't know.

Q You don't know whether it extends up stream from your hole up to the tunnel, do you?

A I am quite sure it does.

Q You believe it does?

A Sure it does. It can be proven that it crosses Moose Creek.

Q The same ledge?

A The same ledge.

Q How far is that?

A From here it is probably 2,000 ft. where it

shows across Moose Creek in the mountain.

Q You held up your right hand and swore by the ever-living God?

A That is what I had to.

Q And you are willing to swear before the Living God that that is the same ledge?

A To the best of my knowledge.

Q You say you know these things?

A Judging by the same ore.

Q You mean by the process of calculation, that is the same?

A Yes, I surely do—that is the same ledge—well defined ledge, without question.

Q Well, at the time you went on this ground in May, 1921, to prospect, you knew of the existence of Quigley's Red Top Lode Claim?

A I surely did.

Q You recognized that as a valid location of Quigley's?

A I couldn't consider it anything else.

Q You consider it now a valid location?

A Quigley's? I surely do.

Q The Red Top?

A I surely do.

Q And you knew before you went on the ground to prospect the Silver King that it was a valid location?

A Yes.

Q The Red Top?

A I surely did.

Q If Quigley's location at that time was valid, how can you say that there was any known vein

within the boundaries of Grant's placer claim, known as the Hillside Bench? If Quigley made a valid location, wouldn't Quigley cut that part out?

(Mr. Roth objects to question as being irrelevant and calling for a legal conclusion. Objection sustained. Mr. Stevens takes exception which is allowed.)

Q Why didn't you locate the Silver King when you first went on?

A We wanted to do some work.

Q What for?

A To have a ledge in place.

Q You mean to discover a ledge in place?

A Yes sir.

Q You said, as I understand, that when you got to Roosevelt with the rest of the crowd on the 2nd of June 1921—1919—that you stayed around Roosevelt a few days. That is right?

A Yes sir.

Q And that you worked at the Aitken mine under Mr. Grant?

A Not then.

Q That's just what I wanted to know—you worked for the Commission a month first?

A To the best of my knowledge—an even month.

Q After that, did you work for Aitken?

A Yes sir.

Q On the hill above this property?

A The first work I done for Aitken was to drive pack horses—cayooses—then I went to the mine from Roosevelt.

Q Did you say that Aitken didn't have any tools to work with?

A No tools of any account, that I know of—they borrowed tools there—believe the tools we used were practically all borrowed, if not all. I know of two axes they had supposed to belong to Aitken or the Commission.

Q When Aitken sent his outfit up there, he sent it on board a boat—a steamboat—didn't he?

A Yes.

Q The same boat you went on?

A Yes.

Q Do you mean to say he went there and didn't take any tools?

A It wouldn't be possible.

Q That he would take his outfit in and wouldn't take any heavy outfit?

A There was some heavy stuff left at Roosevelt all summer.

Q All of it?

A Yes, all of it as far as I know—they might have had something up there possibly.

Q Aitken had a tent there—8x10?

A It might have been 8x10—it was very small.

Q But he had a tent?

A Yes.

Q Up hill?

A Yes.

Q Before he built the bunkhouse?

A Long before.

Q He put up some buildings, didn't he?

A Long after.

Q I didn't say when—I asked whether he did.

A Yes.

Q When you and Mr. Campbell started the hole that you claim to have sunk to bed-rock and deeper, Mr. Quigley was with you, wasn't he?

A When I started the shaft, you mean?

Q Yes, that day.

A Yes sir.

Q Mr. Quigley was there?

A He told me where to sink.

Q You and Quigley lined the place up and by taking a straight line down hill, agreed upon the place to sink? That is true?

A Yes sir.

Q And you had just—the first thing you did was to drive a driving shaft and put in some powder and blow out the surface? Was that it?

A Yes.

Q You and Campbell both worked there that day?

A Part of the day.

Q And you were—just had the flu and didn't feel very well and didn't go over a couple of feet that day?

A Not any more in the shaft.

Q In the shaft you started?

A We done a lot of other work around the shaft the first day.

Q You went down two feet the first day?

A We might have—it might have been more.

Q You said two or three feet?

A Yes.



Q How far down did you go the second day?

A I don't know.

Q Do you know the third day?

A I don't know, but to the best of my knowledge we were through the frost and a little more.

Q That would be about five feet?

A In that neighborhood—we put in some little timber and sodded around the shaft to stop the water coming in the shaft—coming in on one corner.

Q Did you ever have any experience in pounding your driving shaft down in ice and putting in a fuse and blowing it out?

A In ice—blasting ice?

A Yes.

A I couldn't say I ever did.

Q Don't you know as a matter of fact that a man can blast ice and take it out of a hole faster than out of virgin soil?

A He might.

Q You think he would?

A I couldn't say he would.

Q After you got down about seven or eight feet, you put on a windlass?

A About that.

Q Probably the second or third day?

A I daresay the third.

Q Well, you are pretty sure that you started to put your shaft down there on the 22nd of May?

A I couldn't be positive—I had no occasion to write it down.

Q Could it have been as early as the 15th day of May?

A Oh no.

Q Did you find any float in that hole at ten or twelve feet below the surface?

A I found a little.

Q It had no connection, in your judgment, with the vein you afterwards struck?

A Had no connection?

Q No.

A It was the same kind of ore.

Q It wouldn't rise above that—it rolled down hill in all probability from a vein above?

A It might have.

Q It was down deep enough so that it didn't fall off Aitken's wagon, wasn't it?

A It surely didn't.

Q That first day you started your hole, you say you noticed about twelve feet to the eastward of where you sunk there was an old hole?

A Yes sir.

Q And was it full of water or not?

A I wouldn't be positive whether it was full, but to the best of my knowledge, it was not full—it might have been down a foot or two.

Q But the water, as far as you recollect—the water was not even with the surface of the ground?

A No, there was sod and a little seepage wouldn't let it come quite to the surface on the lower edge.

Q You found at least one of the walls of that vein?

A Well, I found a small—some wall on one side.

Q You are satisfied in your own mind that it was mineral in place, was it not?

A Yes sir.

Q On account of having found a wall?

A I found some wall.

Q You stated that you examined some samples of rock that came from Eldorado Creek that were given you by Owen?

A I did.

Q And that you threw them out of the hole after examining them?

A I did.

Q How did he get them to you? Could he hand them to you?

A He couldn't reach them to me—just tossed them down.

Q You don't mean to tell how deep down you were?

A It would be possibly 10, 12 or 13 feet.

Q Was Campbell ever down in that hole, as far as you know?

A To the best of my knowledge, he never was after we got through the frost.

Q Now, in June 1921, just ten days after you had made your location, yours and Campbell's, you had a talk with the plaintiff, William Grant, at Roosevelt?

A Ten days after I made what?

Q Made location .

A I don't know.

Q You made your location on the 6th day of June 1921?

A Yes sir, to the best of my knowledge.

Q And you said you nearly reached Roosevelt

on the 15th of June, but went in the next morning, the 16th?

A Yes sir.

Q And at that time you had a conversation with the plaintiff, William Grant?

A Yes sir.

Q At Roosevelt?

A Yes sir.

Q Thirty miles away from this property?

A About that.

Q That William Grant said to you that he heard you had struck it rich, and that he understood you had struck it—or sunk in one of his (Grant's) holes?

A He said 'one of his holes' or 'in his hole'—I knew what he meant.

Q He was referring to this placer claim of his—the Hillside?

A I believe that was what he meant.

Q That is what you thought at that time?

A Yes.

Q And he was referring to your Silver King Mining Claim?

A Yes.

Q And that you then and there told him you didn't sink in his holes?

A Yes, certainly I did.

Q Was that all that was said about it?

A About this hole?

Q About the claim.

A Yes sir. It ended right there.

Q He made no objection or protest?

A None whatever.

Q Was anybody present beside you and he?

A Yes sir—Mr. Miller—known as “Cow” Miller.

Q Where is Mr. Miller now?

A I don’t know.

Q Have you seen him around town?

A No.

MR. ROTH: He is in the Tolovana.

Q The next time you saw the plaintiff was in June, about the 22nd, on this property?

A About the 22nd or 23rd.

Q That was when Campbell and Dalton were also present?

A Yes sir.

Q And Grant didn’t say anything and nobody said anything to Grant about this property?

A There was no conversation whatever.

Q But you saw the plaintiff about July 3, 1921, down on what you claim as the Silver King property?

A I said at the lower end of Silver King.

Q And that Grant was with the mail?

A On his way to Roosevelt.

Q And you had some conversation with Grant?

A Yes sir.

Q And Grant told you to keep off the Hillside Bench Claim?

A He did.

Q You and he had some words?

A Yes sir.

Q And that was about all that was said?

A That was all that was said with reference to keeping off the ground.



Q You never saw Grant between the time you first entered on the property until after you had located, did you?

A Ask the question again.

Q Did you ever see Grant, or did Grant ever see you, after you entered upon this ground to prospect, and the time you located it which was June 6th?

A I saw him June the 16th at Roosevelt, the first time after.

Q That was after you located?

A Oh yes.

Q I am talking about whether or not you ever saw Grant, or Grant ever saw you, after you had entered upon the ground to prospect and up to the time you located.

A I don't remember of seeing him.

Q You didn't see him?

A I don't remember of seeing him.

Q During all that time Grant was at the Landing, or Roosevelt?

A I don't know.

Q You don't know?

A No, I don't know—I knew he had been there or was supposed to have gone there.

Q You talked to Harry Owen on Eldorado Creek about August 1921, didn't you?

A August?

Q Wasn't it?

A Not that I know of.

Q When was it you talked to Harry Owen on Eldorado?

A It must have been the early part of October.

Q October 1921?

A Yes.

Q After you had been served with process in this case?

A Yes.

Q And Harry Owen stated that it looked bad for you and Campbell, whatever it was, for going down in Grant's hole?

A He said something about going down in a hole—it looked bad—or something to that effect.

Q You told him it didn't make any difference?

A Yes, that I couldn't see where it made any difference if we went down in some hole—I didn't tell him in Grant's hole, or any other.

Q You did say you led him to believe that way—that Campbell and Tobin did go down in some other hole?

A I led him to believe we went down in a hole—he believed I meant one of Grant's shafts. He was looking for information and I said that to him.

Q You afterwards saw Grant seven miles below at Bartlett's place?

A After when?

Q After he—well, after July 3rd when he told you to keep off the ground.

A Yes sir—stayed over night.

Q And he didn't say anything about this ground, and you didn't ?

A No.

Q There was no conversation?

A No conversation.

Q After that, on July 22nd or 23rd, you saw

**Grant** in the vicinity of this ground and you had no conversation with him?

**A** I had no conversation with him, no.

**Q** And the trouble that was had, according to some of the testimony in this case, between the plaintiff and defendant, Campbell, you didn't see at all?

**A** I did not see it.

**Q** You were down in the hole when it occurred?

**A** Yes sir, down in our shaft.

**Q** You say you saw a trespass notice, or trespass notices, before July 3rd on this ground?

**A** I wasn't sure what date.

**Q** Understood you to say it must have been the 1st or 2nd of July?

**A** I believe it was about that time—early part of July.

**Q** You didn't read them?

**A** I didn't read them.

**Q** How close were you to those notices?

**A** I couldn't say—might have been a few feet away.

**Q** You were working in the shaft at that time?

**A** Yes sir—not all the time—couldn't work all the time—couldn't get the powder smoked out.

**Q** How many notices did you see there?

**A** I believe two notices.

**Q** They were not very far away from where you were?

**A** Thirty or forty feet.

**Q** Why didn't you read them?

A I understood they were notices—they didn't interest me.

Q You understood they were Grant's notices?

A Yes.

Q You didn't care enough about them to even read them?

A No, I didn't go near them.

Q You say you were in—you were in Mr. Quigley's tunnel on the 10th day of May 1921, were you?

A I don't remember that I was.

Q Was it the 10th day of May 1921 that you saw Broker and Dalton and Owen?

A To the best of my knowledge.

Q And that was the day you and Owen had some kind of talk about the direction of Quigley's lode?

A That was all that was said.

Q That was the same day?

A The same day we spoke about the ledge coming down hill.

Q Then the next day, which would be the 11th day of May, 1921, in the morning you put out a prospector's stake?

A Yes sir.

Q About close to the place where you afterwards sunk your tunnel?

A No sir.

Q Where—about—did you put that stake?

A Way down hill a long ways.

Q How far from the place you sunk your shaft?

A I don't know.

Q About how far?

A Possibly 1000 to 1200 ft.

Q What was on that stake—any notice?

A There was some writing—I don't remember.

Q You wrote it?

A I did.

Q Did you write it after the stake was put in place or before?

A Before, if I remember right.

Q Before you put the stake in?

A Yes.

Q Did you drive the stake in the ground?

A No, tied it to a bush—the ground was frozen.

Q Tell us as near as you can what you wrote on that stake.

A Well, to the best of my knowledge, I claimed 1500 ft. up the hillside—mountainside—by 600 ft. in width, for prospecting purposes.

Q For prospecting purposes? Did you sign your name?

A Believe I did.

Q Did you sign Campbell's name to it?

A To the best of my knowledge—both names.

Q Was that below the lower line of—below the lower side line of Grant's placer claim there?

A Down hill?

Q Yes—that you put the stake.

A Yes.

Q Was it on this claim that you refer to as being Hamilton's claim, south of Grant's claim?

A I believe it is on Hamilton's ground.

Q Well, was it within the boundaries of the claim immediately below the Grant lines, or was it on the placer still farther down?



A I believe a little further down on the next claim.

Q Where was that prospecting stake that you put in and have just described with reference to the lower end line of the Silver King Lode Claim?

A It lacked 200 ft. of being as far down the hill as it is now.

Q The prospecting stake was not as far down as your lower end line now is? That is right?

A Yes sir.

Q How much did it lack? What is the distance?

A I don't know—I didn't measure.

Q Tell us as near as you can about what distance.

A It might be 200 ft. farther now than then.

Q In the neighborhood of 200 ft.?

A Yes.

Q As I understand you, you didn't do any prospecting—any sinking down below where you say you put in that prospecting shaft?

A I didn't put in any prospecting shaft.

Q I mean prospecting stake.

A No.

Q That is all you did—put in a stake with a notice on it?

A Right then, that was all. Done some work along the foot of the hill to see if there was any gravel or float—different places—and afterwards went up near to where we now have the shaft.

Q You have been up to the stakes and examined them—of the Troy Placer location that Mr. Campbell has located covering part of the property in dispute in this case?

A You ask—had I been there?

Q Yes.

A No sir, I don't know where they are.

Q Did you ever examine the location notice?

A No sir.

Q Didn't you say you went to the Recording Office there to find out about that location—went in to—(interrupted)

A I went in to see Mr. Wilson.

Q But you didn't examine the records?

A To the best of my knowledge, I didn't

Q You heard me read the location notice yesterday?

A I did.

Q It covers—it practically covers all of the Silver King location that is above this lower blue line of the placer claim, does it?

A Yes, it does.

Q It covers other parts of this placer claim claimed by Grant?

A It does.

Q It covers the discovery shaft of the defendants, Campbell and Tobin, does it?

A I believe it does.

MR. STEVENS: You may take the witness.

### **Re-Direct Examination**

BY MR. ROTH:

Q Referring to this placer location made by Mr. Campbell, about which Mr. Stevens has just now asked you—I will ask you to state whether or not you and Mr. Campbell are partners generally over

there, or each of you own ground separately that you and he are not interested in.

A Yes sir.

(Mr. Stevens enters objection to the question on the ground of not being proper re-direct examination, and asking for legal conclusion of the witness, also being leading and suggestive. Objection over-ruled. Exception taken and allowed.)

Q What is your answer?

A Yes sir.

Q You own ground that he is not interested in over there?

A Yes sir.

Q Does he own ground you are not interested in over there—down on Moose Creek?

A I believe he staked something down on Moose Creek which I don't pretend to be interested in in any way—am not positive.

Q On Bear Creek?

A Yes.

Q Is this the only piece of ground you boys are partners in?

A Yes sir.

(Mr. Roth states that he over-looked asking this witness about one matter when he had him on examination in chief.)

Q After you made the discovery in that hole which is known and designated as Campbell and Tobin's discovery shaft, what, if anything, did you do on the ground in the way of staking or marking the boundary lines?

A We staked it.

Q Just in detail state just what was done.

A You mean after discovery?

Q Yes.

A I put up a discovery post.

Q Where?

A Right near the corner of the shaft.

Q What kind of a post was that?

A It was a spruce post, to the best of my knowledge.

Q About what size?

A It might have been four inches or a little less.

Q In what?

A Diameter.

Q How tall?

A It might have been 4 ft. over the ground.

Q Did you write anything on it?

A Yes sir.

Q Just state what you wrote on it.

A "Discovery post. Discovered June 1st, 1921, rock in place." and I believe I put my name and Mr. Campbell's name on the discovery post.

Q Was anything there showing what you claimed?

A On the discovery post?

A Yes.

A Only 'rock in place.'

Q I mean what you claimed—the amount of ledge you claimed—was that on the discovery post?

A On the initial post.

Q Not on the discovery?

A To the best of my knowledge.

Q After that what did you do?

A The next thing we did, we worked there for six days before we staked it to define a ledge—to see whether we had anything to stake—worked continuously six days.

Q Then what?

A Staked it on the 6th day of June.

Q What was the first thing—what was the first stake?

A The initial post—a good sized stake, probably five inches in diameter.

Q Was it squared?

A Squared somewhat—blazed on four sides.

Q Where was that stake set?

A At the lower end of the Red Top Lode, joining Mr. Quigley's stake—his center end stake, and tied with a wire.

Q That would be at the upper end of the Silver King?

A Yes sir.

Q What, if anything, was written on that stake?

A Notice of location, claiming 1500 ft., to the best of my knowledge, northwesterly.

Q How? I didn't understand?

A The initial post—notice on this initial post claimed 1500 ft. in this direction—northwesterly.

Q That isn't northwesterly—it is southwesterly. What did you have on the stake?

A I will tell you—I claimed 1500 ft. in this direction, whatever it may be, by 600 ft. wide—300 ft. on each side of the stake.

Q Did you say down hill or—(interrupted)



A I said 'whatever direction it is' southwesterly direction.

Q What is the next thing you did?

A Put up those—(interrupted)

Q What is the next stake—give us the first one you set.

A As I remember, Mr. Campbell put up this corner post which would be the northwesterly corner, and I went over and put up the opposite corner—also tied it to Mr. Quigley's corner post.

Q What was the one you put up?

A Corner post of the Silver King Lode Claim.

Q Did you give it a number, or did you designate what corner post it was?

A Yes sir.

Q What did you say?

A North—southeasterly—(refers to note)—northeasterly corner, the way you have the plat.

Q That is the way the map shows it—northeasterly. What is the next thing you did?

A Went down and staked the other end.

Q Which one did you put up first?

A The center end.

Q What kind of a stake?

A A stake about four to five inches square.

Q How high?

A Four feet above the ground after drove in the ground.

Q Did you write anything on it?

A Yes sir. "Center end of the Silver King Lode

Claim" and to the best of my knowledge, the date and our names.

Q Did you show what you claimed?

A Yes sir.

Q What?

A Claimed 1500 ft. up hill by 300 ft. on each side of the center end stake.

Q What was the next stake you set after that?

A On up Moose Creek—it would be the southeast corner stake of the Silver King.

Q What kind of a stake?

A A stake about three to three and a half inches square.

Q How high?

A Four feet over the ground.

Q Did you write anything on it?

A Yes.

Q State it.

A "Southeast corner of the Silver King Lode Claim."

Q Anything else—names?

A I don't know that I did—I probably did.

Q You don't remember?

A No.

Q What was the next stake?

A I went down hill and cut a line through the bushes—down to the other corner—cut a right of way through and then put up a stake.

Q What kind of a stake?

A About three to three and a half inches in diameter.

Q What corner did you put it on?

A The southwest corner.

Q What writing was on that stake?

A "Southwest corner of the Silver King Lode Claim."

Q Was anything else put on it?

A I wouldn't be positive.

Q What size stake?

A Three to three and a half inches. It was up on a gravel pile.

Q How high above ground?

A It might have been four feet.

Q Was it more than three feet?

A Yes sir.

Q Were there any stakes put on the side lines of that claim?

A Yes sir.

Q How many?

A To the best of my knowledge—one on each side.

Q Did you ever go to those stakes?

A Only to one.

Q Which one?

A On this line. (Indicating)

Q That would be the westerly line?

A Westerly line.

Q Did you see anything written?

A Just "side line stake."

Q Of what?

A The Silver King Lode. There were two stakes on this side line—Mr. Campbell put up one and I the other.

Q Where did you put one up?

A Down near the woods and brush to show there was a line there.

Q What writing was on that stake?

A "Side line of the Silver King Lode Claim."

Session 2:00 P. M. February 7, 1922.

J. L. TOBIN, one of the defendants, re-called as witness in his own behalf, being heretofore sworn, testified:

**Further Direct Examination.**

BY MR. ROTH:

Q Mr. Tobin, are you a citizen of the United States?

A Yes sir.

Q Where were you born?

A New York.

MR. ROTH: That is all.

MR. STEVENS: That is all.

WILLIAM J. CAMPBELL, one of the defendants, recalled as witness in his own behalf, being heretofore sworn, testified:

**Further Direct examination**

BY MR. ROTH:

Q Mr. Campbell, are you a citizen of the United States?

A Yes sir.

Q Where were you born?

A In the state of Iowa.

MR. ROTH: That is all.

MR. STEVENS: No cross examination.

JOHN A. DAVIS, called as witness for the defendants, being duly sworn, testified:

**Direct Examination**

BY MR. ROTH:

Q What is your name?

(Mr. Davis asks permission to address the Court, which is granted.)

(Mr. Davis addressing the Court)

Acting under instructions from the Secretary of the Interior—(Interrupted)

(Mr. Stevens asks if this is in answer to any question and Court states that Mr. Davis has permission to address the Court.)

—I am instructed to explain to the Court that employes of the Bureau of Mines are without authority in law to enter or inspect mines and mining property, and that this can only be done with the consent of the mine owners or operators, and that if employes of the Bureau of Mines are required to give evidence in Court, mine owners and operators will cease to permit them to enter their mines, and as a result, the chief purpose of the Bureau of Mines will either be hampered greatly or entirely frustrated, the purpose and aim of the Bureau being to make such scientific investigations as will avoid and prevent mine accidents, increase efficiency, and prevent waste in mining. I am instructed to inform the Court that, frankly I do not intend to place myself in contempt of Court, but that I have been instructed under the authority of the Secretary of the Interior of the Federal Government, to ask the right of exemption from



testimony, as a protection of the Government's interests, it being manifestly inimical to the Government's interests, should employes of the Bureau of Mines be called upon to testify in mining litigations and be required to state testimony that they have received of a more or less confidential nature from mine owners at the time permission was given them to enter their property.

(The Court asks counsel generally what is the testimony required of this witness.)

MR. ROTH:

Generally, I expect to ask him concerning his investigation of the lode in question—his personal investigation of the lode in question.

MR. STEVENS:

You mean of the Quigley location or of the defendants' location? I don't concede that they are the same lode.

MR. ROTH:

I think the lodes are in question—concerning his investigation on the Quigley Red Top Lode Claim—his scientific investigation of same, and tracing the same through the country, and for the purpose of showing the result of his investigation upon that line, if the Court please.

MR. STEVENS:

If the Court please, it seems to be conceded—  
(interrupted)

MR. ROTH:

I further wish to state this—that I do not intend to ask the witness anything about any matters that he has obtained confidentially from any one—

what he has which is simply—can be given without violating any confidence or trust of any kind or character.

MR. STEVENS:

It appears from the testimony of both sides in this case that Quigley's quartz location known as the Red Top Quartz or Lode Claim, is a valid location, and it is admitted by stipulation in substance that these defendants discovered mineral in place at a depth of 40 ft. or more in their shaft, concerning which they have testified, and unless this witness can testify to the actual existence of a lode or vein of rock, bearing mineral, in place within the boundaries of the placer as it existed—as the boundaries existed in May 1921, the testimony of the witness would be immaterial, absolutely. I say, unless he can testify to the existence of a lode or vein in place, as distinguished from any theory or belief or calculation of any kind, any observations he might have made outside of the boundaries of plaintiff's placer claim, as the boundaries existed at the time defendants entered, are absolutely immaterial in this case.

COURT: Mr. Davis, was the examination you made of this lode known as the Quigley lode, made in your official capacity as a representative of the Bureau of Mines?

MR. DAVIS: It was, and the entire investigation I made of the surrounding country was made in the same capacity.

COURT: I feel frank to say that it would be causing undue embarrassment to the office of the Bureau of Mines to require any of them to testify as

to any knowledge gained by them with reference to any question in controversy in this case. It would tend very greatly to lessen their usefulness as officers in that Bureau, and for that reason the testimony of this witness will be excluded, if it is for the purpose stated by counsel.

MR. ROTH: I wish to make an offer of what I expect to prove by this witness. We expect to prove by this witness that in the first half of the month of September 1921, he investigated the lode or vein which runs through the Red Top Placer—I mean the Red Top Lode Claim, of J. B. Quigley, and traced the same ledge across Moose Creek for a distance of about half a mile from the Quigley tunnel in a south-westerly direction from the same, and that the strike as shown crossed the discovery shaft of these defendants, and that the ore taken from the discovery shaft of defendants is the same in character and appearance as the ore taken from the lode on the Red Top Claim, and that across Moose Creek in a south-westerly direction from the tunnel of J. B. Quigley on the Red Top Lode, in a straight line from the strike on the Red Top, a lode was found by John Hamilton and lessees, which is similar—that is in a vein which is similar and containing ore similar to the vein and ore on the Red Top Lode Claim.

MR. STEVENS:

To which offer the plaintiff objects to the testimony upon the grounds that the same is wholly immaterial, incompetent in this case, does not tend to prove any issue of law, raised by the pleadings, or otherwise, and at the same time it is objectionable

and inadmissible for the further reason that the statement of counsel assumes a fact that is not proven in this case—that the vein or lode in question runs through the Quigley Quartz Mining Claim, which fact is further immaterial.

COURT: Objection is sustained and offer denied.

MR. ROTH: It does not yet appear what official position the witness holds.

COURT: I think it would be proper to ask those preliminary questions first before the witness is excused. It does not yet appear in evidence what official position he occupies.

MR. ROTH: (to Mr. Davis)

What official position do you occupy, Mr. Davis?

(Mr. Davis asks permission to again address the Court which is granted.)

MR. DAVIS: (to the Court)

In answering this question, do I jeopardize my claim for exemption?

COURT: No.

MR. DAVIS: (to Mr. Roth)

Superintendent of the Alaska Station of the United States Bureau of Mines.

MR. ROTH: And what—have you any profession?

MR. DAVIS: I have.

MR. ROTH: What is your profession?

MR. DAVIS: Mining Engineer.

MR. ROTH: That is all.

MR. STEVENS: Mr. Davis, did you hold the position that you have mentioned at the time that you visited the claim of Joe Quigley in the Kantishna



Mining Precinct, Alaska?

MR. DAVIS: I did.

MR. STEVENS: That is all.

MR. ROTH: That is all.

J. B. QUIGLEY, called as witness for defendants, being heretofore sworn, testified:

### DIRECT EXAMINATION

BY MR. ROTH:

Q Mr. Quigley, when did you locate the Red Top Lode Claim?

A I don't remember the exact date I located it.

Q Defendants' Exhibit "D"—I mean Plaintiff's Exhibit "D"—which is a certified copy of a notice of location of the Red Top Lode Mining Claim, states that "on the 7th day of August, 1920 I discovered a lode of rock in place bearing gold, silver and other valuable deposits which lode I named the Red Top Lode." Now, from that, I will ask you to state if that is the correct date—the 7th day of August, 1920, as appears in this notice of location.

A I think it is. If that is a copy, it certainly is the date.

Q With reference to the date that that certificate bears, when did you make your discovery on that location?

A When did I make discovery on that location?

Q Yes—with reference to that date.

A I had the discovery dug out on that location before I made it.

Q Before you filed the certificate?

A Yes, and before I staked the ground.



Q About when was it with reference to the time that you have set forth in that notice of location—when was it you first made discovery within the exterior boundaries of that claim—about how long before?

A Perhaps a day or two before—before I located it.

Q Now, if you made the location at your point—I mean after you located the ledge at the point of your discovery, where did you next do any work on that ground?

A Where next did I do work—

Q Yes, on that lode.

A Well, what I used for discovery—I made discovery down hill and worked up hill—

Q But that wasn't the first place you found the ledge?

A No.

Q Where was it you first found the ledge?

A That was probably half way up the hill, as near as I could figure, between my various holes.

Q Say, between the present mouth of your tunnel and what you call your discovery—how far was that? About half way?

A Something in the neighborhood of that.

Q How many places along there did you open that ledge?

A In four different places, counting the tunnel, I was positive I had the lead in place.

Q How did it line up—those four places?

A The four places lined up very accurate—you couldn't call them a direct line, but on a general

course they was very accurate—as accurate as you could expect to find them.

Q The difference in elevation makes the difference in line—does it not—on the apex?

A Well, the difference in the slope of the hill would make a little difference in line.

Q And that difference is due to the dip of the vein, is it not?

A Yes, naturally due to the dip of the vein.

Q If the vein was perfectly perpendicular and straight, the erosion would not change the course, would it?

A No, I wouldn't think it would.

Q But if the vein dips and the hill washes off, why the line of the apex would not be a straight line?

A I don't know how it is. We always figure if the hill dips—if the dip of the lead is the same in depth—why it should, if the dip of the hill is the same slope, it should be a direct line even then.

Q That is true—you are right.

A That is, provided the vein runs true, but so far I fail to find a wall running, you might say, in a true line—the general strike would be on a certain course, but on the wall of the lead there is more or less variation.

Q How big a vein is that?

A It varies from—I cross-cut it in one place where I think it would measure more than 20 ft. if cross-cut straight across—at least 16 ft.—on the one wall I haven't got through what I consider the ledge matter yet.

Q What kind of vein is it, if you know?

A What do you mean?

Q Is it a fissure—I mean a true fissure vein?

A It is what I would call a true fissure vein and what geologists term it.

Q Do you remember when Campbell and Tobin started their shaft on the discovery—on the claim immediately adjoining yours to the southerly side?

A I remember they started.

Q You were there?

A I was looking at the job that morning.

Q At that time how far had this lode been traced, to your knowledge?

A Well, I couldn't tell you as I never measured the distance between holes—I may have measured it some time too—but the distances have slipped my memory.

Q Do you know of that lode being up to that time—being discovered in any other place off of the Red Top?

A Why I don't know of that lode—but there was a lode discovered on the opposite hill where quite a few in conversation thought it might be a continuance of mine.

Q On the opposite side of Moose Creek?

A On the opposite side of Moose Creek.

Q How did it line up, taking the difference in elevation in consideration in different conditions?

(Mr. Stevens enters objection on the ground of being wholly immaterial. Court understands they are talking about the Quigley lode, and Mr. Stevens states they are talking about the vein in the opposite

hill. Court over-rules objection. Exception taken and allowed.)

Q How did the point of that discovery compare with the line or with the strike of the lode on the Red Top, taking the difference in elevation into consideration?

A It is pretty hard for me to state that because not ever taking the course of the vein with an instrument, it is pretty hard to get it.

Q Were you ever present on the ground when any mining engineer did take the course?

A I was present on the ground when Mr. Hamilton got—and Mr. TenEych and I believe it was Mr. Connelly—had Mr. Davis take the strike of the lode and to see if it compared to where they were looking—where they made discovery on the opposite hill.

Q What was the result of that?

(Mr. Stevens enters objection on the ground of not being the best evidence. Objection sustained. Mr. Roth takes exception which is allowed.)

Q That was Mr. John A. Davis who you refer to?

A Yes sir.

Q Did you ever see any of the ore that came out of that prospect across Moose Creek by TenEych, Jack Hamilton, and who else?

A A man by the name of Connelly.

Q Did you ever see any of the ore?

A I never did. They brought some pieces of ore several times, but I don't know whether they were from that place or where they came from.

Q Along on that same strike on the other side of Moose Creek, have you any location or locations?



(Mr. Stevens enters objection as being immaterial. Objection over-ruled. Exception taken and allowed.)

Q On the other side of Moose Creek, which would be the southerly side—I don't know whether that is the right point of the compass, but that is what I am going by on this map—but on the other side of Moose Creek from the side on which the Red Top Lode Claim is situated, have you any quartz claim or quartz claims?

A Yes sir, I have two.

Q Have you made any estimates to ascertain whether or not they are on the strike of this lode on the Red Top?

(Mr. Stevens enters objection, stating that the law is well settled that you cannot arrive at the existence of a lode claim within the boundaries of any particular claim in dispute by estimate, so if he made any estimates or has any theories, or believes in the existence, it is absolutely immaterial. Objection over-ruled. Exception taken and allowed.)

A From the strike of the lode on the Red Top, in lining up across there, by figuring the depth of the lode, the location I have got on the opposite hill—and considering more of an elevation than on that side of the creek, and by figuring the difference in the dip of the lead as it would climb the hill on the opposite side—it would seemingly line up practically the same place, as near as I could tell without instruments.

(Mr. Stevens moves that answer be stricken out. Motion over-ruled. Exception taken and allowed)



Q How much experience have you had over in that Kantishna country there in prospecting and locating lodes?

A I think it was—I think the year 1911, I started working on lodes, and I used to work—I think it was the year 1911 I started in—and the first few years I worked in the placer in the summer time during placer season and worked on lodes in the winter—the last four years have worked continuously on lodes.

Q After that you have been prospecting all the time?

A No, not prospecting all the time.

Q On the day that Campbell and Tobin started their discovery shaft there did Tobin come to see you?

A He did.

Q Just tell the jury what you and Tobin did.

A Well, as near as I can remember, he came up in the morning and I was just starting to sharpen steel, and he asked me—(interrupted)

(Mr. Stevens objects to any conversation unless the plaintiff, Grant, was present. The Court instructs Mr. Quigley that the question is what he and Tobin did, not what was said. Objection is sustained)

Q Just state what you did—the two of you together—without relating any conversation.

A Well, if it is just what we did. Mr. Tobin started to work on the hole and I started to sharpen my steel in the shop.

Q Did you and Mr. Tobin go up to any of the holes?

A We did a little later on.

Q Did you do any siting or lining?

A We did.

Q Did you point out any place where you thought the line run?

(Mr. Stevens enters objection to question on the grounds of being leading and suggestive. Objection sustained.)

Q Just state what all you did, Mr. Quigley, without relating any conversation.

A Well, I didn't help him sink the hole at all—the only thing I did was sharpen my steel.

Q Very well.

A I think I had some picks and drill I had to sharpen that morning.

Q Where did they start to sink that hole?

A They started to sink the hole a short ways from my center end stake.

Q With reference to the line of holes in which you opened the lode on the Red Top—where did they start that shaft with reference to that line?

A Well, where they started the shaft, if I had been attempting to locate the lead below me, I would have started myself.

(Mr. Stevens objects to answer on the grounds of not being responsive to the question. Objection sustained.)

Q With reference to that line of the holes upon which you had opened the ledge, where did they start that discovery shaft?

A It was practically on line.

Q I will ask you to state whether or not you saw them commence their work there?

A I did.

Q Did you see any hole in close proximity to that shaft they started at that time?

A As I remember, there were two holes—I never paid much attention outside of my own work—as I remember, there were two holes a very short distance from where they started..

Q Now, at the point where they started that shaft at that time, state whether or not that is the same shaft they continued to work in.

(Mr. Stevens enters objection to the question as being leading and suggestive. Objection overruled.)

Q Do you know whether or not the shaft that you saw them start to sink is the same shaft that they kept on working in until they got to bed-rock?

A Yes sir, the same shaft.

Q Do you know that they did not go into another shaft or hole started on that ground?

A I know they did not.

Q Do you know William Grant?

A I do. That other question you asked if I knowed whether they went into another hole—I don't know, they might have went in and taken a look, but I know the shaft they started was the shaft they went down in.

Q You know they didn't work out of any other?

A I know they didn't.

Q Do you know a man by the name of Sandy Burr, known as 'Big Sandy'?

A I do.

Q In about the month of August or September

1920, while you were working on the Red Top Lode Claim and in a hole on that lode, or in a hole which is now on that lode, did you have the following conversation with William Grant in the presence of Sandy Burr, known as 'Big Sandy'? Did Mr. William Grant ask you what you was doing and did you reply, "I dug up a pretty nice looking prospect," and did you say to him that you was looking for him to come along as you wanted to get a building site on the flat below on his placer claim, and did he in reply say to you, yes, you could get a building site if you would turn that work in as representation work on his placer, and did you then say to him that you don't think—did not think it was on his placer at all, and did he in reply say, "Oh yes it is, don't you see that stake up there,"—pointing to the stake which now stands above your house. Did you have such a conversation in substance with him?

A I did.

(Mr. Stevens enters objection on the ground that the same question was not put to Mr. Grant. Objection over-ruled. Exception taken and allowed.)

Q Did you, not long after that conversation, and before O. M. Grant did the assessment work on the Hillside Placer Claim, while you were working on the lode somewhere on the Red Top, meet William Grant, at which time the following conversation took place? You said, "If you would make me a bill of sale of the placer claim, I would keep the representation work done on it, as I understand that you located it for warehouse purposes anyway" and to which he replied, that he couldn't do it as he was working for



Tom Aitken and that he located it for him and that it belonged to him, and that you would have to see him about it. Did you have such a conversation in substance with him?

A I did.

Q How much experience have you had in quartz mining and quartz prospecting, Mr. Quigley?

A I have been working at it for several years.

Q Did you ever work on quartz before you went into the Kantishna?

A I never did.

Q I will ask you to state, Mr. Quigley, whether or not that lode that you had discovered and opened on the Red Top Lode Claim was, on the 11th day of May 1921, a well known lode south—in a southerly direction, from the north line of the Hillside Lode—Placer Claim.

(Mr. Stevens enters objection on the grounds that, first, question calls for an opinion and conclusion of the witness; second, no time has been fixed by the question as to the boundaries of the northerly side line of plaintiff's Bench Claim. Objection overruled. Exception taken and allowed.)

Q South of the northerly line of the placer claim —(interrupted)

A I never knew where the northerly line of the Hillside Claim went through.

Q Why didn't you know that?

A Because I never surveyed it out at all to see where the lines were drawn.

Q At a point where your tunnel was located, and from there northerly on the lode, I will ask you to



state whether or not on the 11th day of May, 1921, that was a well known lode in that community.

A Yes, it was considered as a well known lode in that community at that time.

Q Did you see any of the ore that came out of this discovery shaft of the defendants, Campbell and Tobin?

A Did I see any of it?

Q Yes.

A Yes sir.

Q From your knowledge of the ore that came out of this discovery shaft and your experience in following that lode between the point of your shaft—I mean your tunnel, the mouth of your tunnel, and the point you call your discovery—what would you say with reference to the lode opened up in the discovery shaft of these defendants being the same lode that you had followed above?

(Mr. Stevens enters objection to the question on the grounds that witness has not shown himself qualified to give expert testimony—it being merely an opinion, not based upon any facts excepting what he might merely draw from the appearance and location of these two places where the vein was uncovered, there being a distance of some 200 ft. between places; no testimony given to show that it is the same vein and Mr. Roth's question assumes it is the same vein by calling it 'this vein.' Objection over-ruled. Exception taken and allowed.)

A Judging from the ore, I would think the ore is practically the same as the ore I have got in my holes in different places—that is, in appearance.

Q And from all of that, what would you say upon the subject as to whether or not it is the same lode?

(Mr. Stevens makes objection on the ground that witness is not qualified to give expert testimony. Objection over-ruled. Exception taken and allowed)

A If I had been looking for it myself and picked it up down there, I would have thought it was on the same lode.

(Court states that answer is not responsive.)

Q From all that experience you had and comparing of the ore, what would you say as to whether or not it is the same ledge?

(Mr. Stevens makes objection on the ground that it is immaterial what he would say. Objection over-ruled. Exception taken and allowed.)

A I would say—(Interrupted)

(Mr. Stevens makes objection on the same ground as the last objection.)

COURT: What is your answer?

(Mr. Stevens makes further objection which the Court over-rules. Exception taken and allowed.)

A It is my opinion that it is the same ledge.

(Mr. Stevens makes a motion that the opinion of the witness be stricken out as immaterial as he has not shown himself qualified to give expert testimony. Motion denied. Exception taken and allowed.)

Q Were you on the ground which is now claimed to be within the exterior boundaries of the Hillside Bench Placer Claim when William Grant on about the 19th day of April, 1920, went to what is claimed to be the southeasterly corner of that claim—to a stake of Jack Hamilton's on the Horseshoe Placer

Claim—were you somewhere on that claim at that time?

A Yes, I was on the claim. That was when he was locating?

Q Yes.

A Yes, I was there.

Q Was Jack Hamilton there?

A Yes.

Q Did you go with him to what he calls his initial stake?

A No, I don't think I did.

Q How were they traveling there at that time? Did they have snow shoes on?

A Yes.

Q How many pair of snow shoes were there?

A Two pair.

Q They had two pair of snow shoes?

A Yes.

Q Where were yours?

A Mr. Grant used them when he went over to the stake.

Q Where were you when he went over to the stake?

A I started to go across but the traveling was too tough so came back.

Q Did you go with him down to the other stake of Hamilton's which is now called the southeast corner of the Hillside Bench Placer?

A Jack Hamilton and I went over there, as near as I remember—had a pair of snow shoes apiece—it was quite a ways from the trail.

Q Did William Grant go with you?

A Not that I remember of.

Q How was the snow?

A The snow was quite deep.

Q Did anybody write on that stake at that time?

A There was some writing done.

Q Who did it?

A I couldn't say who did the writing.

Q Whether it was yourself or Hamilton?

A Whether myself or Hamilton.

Q Do you know what was written at that time?

A No, I don't.

Q Did you see any of the other stakes set of that placer claim?

A Yes sir, I saw another stake set—set above where my house stands.

Q When was that?

A It was put up the same day the other writing was done.

Q Tell where that stake was got and what was done with it.

A On the road that leads up the hill, when we come out Mr. Grant had an axe with him and there was a pole laying there—they had likely drove up a load of timber going up hill—and Mr. Grant made a stake, hewed the sides, and packed it up hill, and when he got above the house he put it in some rocks—I helped throw the rocks when he put the stake up.

Q Did he write anything on it?

A I think he wrote on it.

Q You don't know what it was?

A No.



Q Did you ever read it?

A Not that I remember of, I never read it.

Q That was the same day that he went to the other two stakes of Hamilton's?

A Yes sir, the same day.

Q What became of Hamilton?

A He went home.

Q Which way?

A Straight across to his cabin—went down a steep hill.

Q Over to Moose Creek?

A Yes, over to Moose Creek.

Q Did you ever see the fourth corner stake of that claim?

A I saw it in the latter part of the summer, staked over on the ridge of the hill.

Q The latter part of what summer?

A Last summer.

Q When did you first see that stake?

A I don't remember the date.

Q But the latter part of the summer?

A Some time in the summer—it may have been early in the summer I first noticed it—was told it was Mr. Grant's—I don't know to date that is his corner stake, any more than I was told it was his corner stake.

(Mr. Stevens asks that the answer be stricken out and the Court rules that it be stricken out.)

Q Mr. Quigley, do you know the elevation of the mouth of your tunnel above Moose Creek?

A Mr. Davis—(Interrupted)

Q Never mind that—did you have the elevation



taken yourself for yourself?

A No.

Q What would you say, from your observations there, about what the elevation of that tunnel is above Moose Creek?

(Mr. Stevens objects to what he would say, first, because he supposes he intends to ask for his opinion, which is immaterial; second, because witness has already stated he hadn't had the elevation taken for himself. Objection sustained.)

MR. ROTH: You may take the witness.

### **Cross Examination**

BY MR. STEVENS:

Q Mr. Quigley, I call your attention to plaintiff's Exhibit "A", which is this map—the point down—the place I point to here called No. 1 post of Grant's Hillside Placer Claim has been identified by other witnesses as being the initial stake. Do you know about that location on the ground?

A I saw it at a distance.

Q That is the same point where you saw Mr. Grant and Mr. Hamilton in about April 19, 1920, is it not?

A Judging from the map, it seems to be.

Q What I want is to identify that particular point

A Yes.

Q Going in an easterly direction over to the southeasterly corner of the Hillside Placer Claim as designated on this map, you find corner called corner No. 2. That is the place you refer to as being on Hamilton's corner?

A Yes sir.

Q That is the place you say where you and Hamilton went there and you are not quite sure that Mr. Grant went while you were there?

A Yes sir.

Q Now corner No. 4 is above your house and designated as Corner No. 4, being the northwest corner of Grant's Hillside Claim—placer claim—that is the same corner you have just testified to as assisting Grant in piling rocks around the stake to create a monument?

A Yes—no, didn't create a monument—stuck it in the cliff.

Q To establish the corner?

A Yes sir.

Q You say at or about that time you didn't see a stake in the northeasterly corner at or about the point called post No. 3 on that map?

A Yes sir—I never saw it at that time.

Q That is the corner, or about the place where you say you saw a stake there about the latter part of last summer?

A Yes sir.

Q Did you ever see a stake there prior to the latter part of last summer?

A Not to notice it—never remember.

Q You built your house after April 1920—did you not? After Grant had located his claim?

A I built in January I think it was—know it was very cold weather.

Q What year?

A 1920, I think it was.

Q 1920 or 1921?

A I guess it would be 1921.

Q You built your house some time after Grant located his placer claim, did you not?

A Oh yes.

Q There is a place indicated on the map here as "Q's residence" do you see that?

A Yes sir.

Q According to the map, that would be located a little less than 660 ft. above this initial post. Is that about the proper location of your residence?

A It is about the proper location.

Q Do you remember of having a conversation with Mr. Grant in regard to the Hillside Bench, or the line of the Hillside Bench, before you built the house and while you were excavating for the foundation?

A No sir, I did not.

Q Did you ever have any conversation with Mr. Grant about the location of your house with reference to his claim, before you actually built the house?

A Yes sir, I did.

Q How long before you started to build the house?

A It was when I asked Mr. Grant—(interrupted)

Q When was it—about?

A It was some time—I can't tell just the date.

Q I don't care for the date—some time about.

A It was some time before snow come in the fall—was asking him about it so I could grade out before

the surface of the ground froze so it wasn't such hard grading.

Q In the fall of 1920?

A Yes sir, I think it was.

Q Had you started to excavate at that time when you had that conversation?

A I don't remember whether I had started to excavate or whether I hadn't.

Q Do you think it might have been November 1920?

A I think it was before November.

Q Do you know whether or not it was before the time O. M. Grant sank a number of holes down here in the same vicinity and below where Campbell and Tobin's shaft is?

A I think it was before Grant started.

Q You mean O. M. Grant?

A Yes.

Q It was before O. M. Grant started?

A Yes sir.

Q Then if O. M. Grant started on the 3rd of November, it was before that?

A It was before, yes sir.

Q Had you started to excavate before you had a conversation with Grant?

A That is what I say I don't know—I may have started to excavate before.

Q Did you ever measure between the initial stake of Grant's and your house?

A Yes sir, I did—I measured it roughly.

Q And what measurement did you take—did you—state whether or not you intended to locate above



the line of the bench claim.

A I intended to—I was measuring to get the distance—I intended to build higher up, but it was not convenient and had to come down.

Q You didn't intend to interfere with the boundary lines of Mr. Grant's placer claim at that time?

A I intended to build inside of the placer claim line if I could get permission. I asked him for permission.

Q You asked him for permission to build at the place where you did build?

A I first asked him if I could have a building site down further on the flat, and afterwards he told me that he was—at first he had asked me to turn this in for assessment work, and after I asked him he referred me to Mr. Tom Aitken. I told him, I had a conversation with him one day, and I told him I understood—it had been rumored—that he had located—I don't know whether I asked him or he said he had located it for a building site—but I told him if he would give me a bill of sale I would go down and do the assessment there. So when Mr. Aitken come I asked him about the building, and also for a dump.

Q Didn't you tell Mr. Grant at some time before your actual building of your residence there that that particular point where your residence now stands was not on his placer claim?

A I remember telling him at one time I didn't think it was on the placer claim.

Q That was because you hadn't measured 660 ft. up from the initial stake?

A I don't think I had measured at that time.



Q Isn't it true, according to this map, Mr. Quigley, your residence is below the 660 ft. point?

A According to this map, yes.

Q Isn't it true that at the time you built there, you tried to keep outside of the boundaries of the placer claim, as claimed on stake 660 ft.?

A At the time I built there I had asked Mr. Aitken for permission to build—had it partly graded out and asked Mr. Aitken for permission to build and he told me to build—I asked about the dump at the same time he told me to build.

Q You knew the claim had been located by Mr. Grant?

A Sure, I did.

Q You saw Mr. Grant's name on the stakes?

A Yes sir.

Q Didn't you tell Mr. Grant that the place where you built your residence was not within the boundaries of his placer claim?

A I remember I told him I didn't think it was—I didn't think it was at that time.

Q Isn't it true at that time that you had in mind, as a matter of fact, that the claim was, or should be, 600 ft. wide instead of 660 feet?

A No, I think I had in mind 660 feet.

Q You had been engaged in quartz mining?

A Yes sir.

Q You knew a quartz mine should be 1500 ft. along the vein and 600 feet wide?

A Yes sir.

Q Didn't you get the width of the quartz mine confused in your own mind and come up here 600 ft.

instead of 660 ft., and that is how you thought the site of your residence was not within the boundaries of plaintiff's placer claim? Isn't it true?

A No sir, I don't think it is.

Q You got confused with the width allowable for placer?

A I realized there was difference between placer and quartz.

Q That is, that there might be a difference—you realized there might be a difference in width, did you not?

A Yes sir, I understand the law to say there was a difference.

Q Did you understand, according to the law, you couldn't locate a claim wider than 600 ft. as a lode claim?

A Yes sir.

Q But you could locate a placer wider than that, couldn't you? You understood that?

A I never knew how the laws were on that point.

Q And you couldn't locate a placer claim narrower than that, could you?—just so long as the placer claim didn't exceed twenty acres? Is that what you understand?

A I always understood that a placer claim was supposed to be 660 ft. and 1320 ft.—that's the way I always locate.

Q Didn't Grant tell you in substance that it was allright if your house was above that line—that it was allright with him?

A No sir, he never told me anything—he referred

me to Mr. Aitken—said he was working for him and I would have to see him.

Q Did he tell you that Mr. Aitken had any interest in this claim?

A He told me he was working for Mr. Aitken and located it for him.

Q He told you he located it for Mr. Aitken?

A Yes sir.

Q When was it he told you that?

A When I asked him about building.

Q How many times was it he told you?

A I think once was all.

Q You knew at that time that he was superintendent of Mr. Aitken's?

A Yes sir.

Q And had been for some time prior?

A Yes sir.

Q And as a matter of fact, was superintendent for Mr. Aitken after that?

A Yes sir.

Q He also told you he located it for Mr. Aitken for a building site?

A No sir, he didn't tell me that.

Q He didn't tell you he had located it for Mr. Aitken for warehouse purposes?

A Not that I remember—that he had located it for that purpose at all.

Q Did he tell you that Aitken had grub-staked him in that country?

A No sir.

Q Only that he was working for Aitken and had located this claim for him?

A And I would have to see Mr. Aitken about a building site.

Q Who did you see about building the next building—the cache?

A Mr. Aitken. I had the cache already up when Mr. Aitken come there.

Q Was that before the house was built?

A Yes sir.

Q The cache is below the 660 ft. line?

A Yes sir.

Q Did you know it at that time?

A Yes sir.

Q You thought it was within the boundaries of the Hillside Bench?

A Yes sir.

Q Did Aitken give you permission?

A No sir, when I built the cache I thought I would take a chance.

Q You built the cache without permission of any one?

A Yes sir.

Q You thought you would take a chance?

A Yes sir.

Q Why didn't you take the same kind of a chance on your house?

A I could move the cache with small expense, and the house would be some expense.

Q Then it was a question of—you considered your own liability wouldn't be much if they made you move the cache—you could move it easily?

A Yes sir.

Q You didn't want to take such a serious chance

as to be compelled to move your house off?

A Yes sir.

Q Did you build the bunkhouse after that?

A Yes sir.

Q Whose permission did you get?

A I asked Mr. Aitken—not for the bunkhouse, but I asked him in respect to building the house and the dump and he told me to build or dump wherever I had a mind to.

Q Any place?

A Yes sir.

Q And you did so after that?

A Yes sir.

Q Without consulting Mr. Grant at all?

A Yes sir.

Q Mr. Aitken had an option at that time to purchase this ground?

A Yes sir.

Q And he was working and mining it?

A Yes sir.

Q And he gave up that option, didn't he?

A Yes sir.

Q And as a result of his workings, he left some water in your shafts?

A Water in my shafts?

Q The ground that Aitken worked, when he left it, he left your mine full of water?

A No sir—he left some of it full of water.

Q You and Aitken had considerable trouble about it?

A No sir, I never spoke to him about it.



Q Haven't you got an ill feeling towards Tom Aitken at this time?

A No sir.

Q You haven't?

A No sir.

Q You never had any trouble?

A No sir.

Q Did you ever have any trouble with Mr. Grant?

A Very little.

Q How little?

A I never had any trouble that I know of.

Q You don't feel friendly, do you?

A I use him as friendly as he uses me.

Q You don't feel friendly—have you anything against Mr. Grant?

A I have nothing against him.

Q Don't you feel unfriendly to him now? Do you or not feel unfriendly to William Grant?

A No sir, I do not.

Q You don't?

A I don't.

Q Do you feel friendly towards William Grant?

A I am friendly with him always.

Q You may pretend to be—but I am asking if you feel friendly?

A Yes sir—I would do Mr. Grant a turn.

Q What kind of a turn? You mean a turn against him, if you could?

A No sir.

Q What kind of a turn?

A If it was possible to do a good turn, I would do it any time.

Q He was neighborly there and didn't object to your putting your buildings along there?

A Yes sir.

Q Did he ever make any objection to your using any portion of that claim as a dumping ground?

A No, I didn't know Mr. Grant owned the ground.

Q You saw him stake it?

A He referred me—he did it for Mr. Aitken—it was Mr. Aitken's and he told me to see him.

Q Did you go to the Recording Office there and see in whose name it stood?

A I thought his word was good.

Q He said he didn't tell you. Who is telling the truth?

A If he said he didn't, there is certainly something wrong.

Q One of you are mistaken? Did you ever go to Mr. Grant and ask him for permission to dump on his placer claim?

A I don't remember asking him for permission.

Q Will you swear you never did?

A I may have—I don't remember asking Mr. Grant, but I may have asked Mr. Grant for the privilege of dumping at the same time he referred me to Mr. Aitken.

Q Where is Mr. Aitken?

A I don't know.

Q He is not in this immediate vicinity?

A As far as I know, he is not.

Q When did you see him last?

A When he was over in the Kantishna.

Q When?

A Just before I started building my house a short time.

Q In 1920. Have you seen him since?

A No sir.

Q Has he been in the vicinity of the ground that you know of?

A He left there in—I don't know, but think it was some time in the spring that year—in March or February.

Q And you haven't seen him since?

A No sir.

Q You have been around Fairbanks for a month or two, have you not?

A Yes sir.

Q You haven't seen Mr. Aitken around Fairbanks?

A No sir.

Q Don't you know as a matter of common repute that he is in the Kuskokwim?

A I understand he has been in the Kuskokwim but I don't know whether he is now or not.

Q When you gave your testimony about Tom Aitken giving you permission to build on there, you know it is absolutely impossible for me to put Tom Aitken on the stand because he is several miles away?

A It don't matter to me whether he is or not—that testimony is true, and it is the same.

Q You say it is the truth?

A Yes. Mr. Aitken being away from here or being here wouldn't change that statement.

(Recess of ten minutes until 3:45 P. M.)

J. B. QUIGLEY, called as witness for defendants, being heretofore sworn, testified:

**Cross Examination, continued.**

BY MR. STEVENS:

Q Mr. Quigley, along about the latter part of September 1921, state whether or not you contemplated starting a new tunnel to begin near the lower line of the Red Top Quartz Claim—near the lower end line.

A Yes sir, I did.

Q Did you, about the month of September, or the latter part of September 1921, on or near this place, state in substance to the plaintiff, William Grant, that you would like to start another tunnel, or a new tunnel, down near the lower end of your Red Top Claim, and asked him whether or not you could get permission from him to dump out of that tunnel on his placer claim?

A I did.

Q You did?

A Yes sir.

Q State whether or not he gave you that permission—state whether or not you obtained that permission to dump.

A I don't remember what his answer was on that.

Q You don't remember his answer? You didn't get permission from him to dump?

A I don't remember what his answer was—think he ignored it.

Q If he ignored it, he didn't give you permission.

A No sir.

Q You don't claim he gave you permission?

A No sir.

Q Yet you asked him for permission?

A Yes sir.

Q Did Campbell or Tobin ever give you any permission to dump on what they call their claim?

(Mr. Roth makes objection on the ground of being irrelevant, incompetent and immaterial. Objection over-ruled.)

A They did.

Q Then if Campbell and Tobin win this case, you will have permission to dump on a part of their Silver Lode Claim? That is true?

A As I understand it—yes.

Q And to that extent you have an interest in the result of this suit, haven't you?

A I never looked at it that way.

Q I didn't ask you that question. You, having obtained permission to dump on Campbell and Tobin's ground, in the event the jury should determine that their claim is valid, and inasmuch as you failed to get permission from the plaintiff Grant to dump on his placer claim, to that extent you have an interest in the result of this suit, haven't you?

(Mr. Roth enters objection which is sustained. Mr. Stevens takes exception which is allowed.)

Q You have taken a great deal of interest in this case?

A I have not—not that I know of.

Q You have been the last month or two while in



Fairbanks a constant associate of Mr. Roth, have you not?

A I have been with Mr. Roth quite regularly.

Q You have been up to his office many times?

A Yes sir.

Q And you have discussed this case with Mr. Roth many times, have you not?

A I have discussed it, but not many times.

Q You have gone to the Model Cafe with Mr. Roth time and time again and ate with him?

A Yes, I have.

Q You and Mr. Roth are on very friendly terms?

A Yes sir.

Q You were here when this case was called last Wednesday morning, were you not?

A Yes sir.

Q And you were in Court at the time plaintiff's counsel asked that witnesses be excluded, were you not?

A Yes sir.

Q And you are the same Mr. Quigley that Mr. Roth asked the Court to make an exception of and not exclude you because Mr. Roth wanted to consult with you about this case during the trial of the case?

(Mr. Roth enters objection to the question which is over-ruled.)

Q State whether you are the same Mr. Quigley.

A You will have to ask Mr. Roth, I don't know.

Q Do you know of any other man in the court room at that time except yourself by that name?

A I do not.

Q Now in all fairness, don't you know as a mat-

ter of fact, that Mr. Roth referred to you?

(Mr. Roth enters further objection which the Court over-rules and states that witness may answer if he knows.)

A I don't know—there may have been other men here.

Q By the name of Quigley?

A There may have been—I never heard of them, but there are many men in here I don't know the names of.

Q It is possible.

A It is possible, yes.

Q I am talking of their Alaska names—you don't know of a man here by the name of Quigley—no man in the country, except yourself?

A No, I don't know of any one.

Q Isn't it true that Mr. Roth had indicated to you that he wanted you in the court room to consult with in the case? Isn't it true?

A I never knew of him saying he wanted to consult with me in the court room—I never knew of it until then.

Q You were quite willing to do so?

A Well, I suppose if I had been called—I don't know what is expected.

Q You are perfectly willing to consult with Mr. Roth from time to time about this case during the trial of it, are you not?

A Yes, of course, I would consult with Mr. Roth during the trial.

Q You have been, during this trial—out of court?

A Yes sir.

Q Frequently?

A Frequently, yes.

Q Do you remember the time in Fairbanks, Alaska, here in Mr. Roth's office, he occupying the District Attorney's Office at that time, or downstairs in the hall, that Mr. Roth introduced you and I?

A Yes sir.

Q And at that time I told you and Mr. Roth that I had brought this suit? Do you remember that?

A Yes sir.

Q And that was the first knowledge you or Mr. Roth had that the suit had been brought?

A That is the way I remember.

Q And didn't I ask you, Mr. Quigley, if you wouldn't be kind enough to come to my office to talk about it?

A You told me to come to your office and talk with you.

Q You said you would?

A Yes sir.

Q And after the expiration of several days, I met you down in front of the Pioneer Hotel and again reminded you of your promise and I said any time before you left town I would like to talk with you? And you said in substance, "That is allright, I am not going to leave for ten days yet."

A I don't remember that.

Q As a matter of fact, you left the next day and never came to my office and never talked about this case at all?

A I will tell you one thing—I was at your office.

Q When?

A When? Last summer.

Q I am talking about when this suit was brought.

A You were talking about last summer.

Q It was after this suit was brought that Mr. Roth introduced you and I—at least I had informed you the suit was brought?

A Yes sir.

Q Since that time you haven't been in my office?

A I have.

Q Since that time?

A Yes sir.

Q Not when I was present?

A No sir.

Q You and I have never had any talk outside of the court room at this trial about this case, have we?

A No sir.

Q Are you able to tell which way the lode, so far as you have uncovered it, within the boundaries of your Red Top Lode Claim, pitches? Does the lode pitch towards the east or towards the west?

A Which way is the dip of the lode?

Q Yes.

A It dips to the southeast.

Q It dips in the direction of up-stream Moose Creek, does it?

A Yes sir.

Q When you go down hill a considerable distance from where you uncovered the vein, and there being a great deal of difference between the elevation of where you found it and not knowing the depth of the over-burden, if you wanted to sink to strike that lode, you would take into consideration the dip of



the vein, would you not? and the elevation?

A Yes sir.

Q Then instead of coming in a direct line down hill along that lode, siting it, you naturally would go a little to the southeast, in order to strike the vein, wouldn't you?

A Not when going down hill on the same slope.

Q Well, if that vein—if the apex of the surface of where the vein was exposed was on a dead level, assuming that the vein or lode had the same pitch or dip, then you would expect to find it right in line if on the apex, wouldn't you?

A If on the apex and it run on a level, I would expect to find it something on line.

Q Now, if the surface was worn so that the top of the vein, say now, was in that direction (indicating), you would expect to find—and you have uncovered it up hill and know it pitches that way—if that vein originally run straight on a level and pitched the same way it did, and by the time you get way down hill, your vein would be way over here to the right, the way it pitched?

A Yes sir.

Q If this was the surface, you would go considerably up hill or to the eastward in order to strike the vein?

A It would depend on the slope of the hill—if I had the strike of the vein here, I would follow along on the level—just to show my idea—if I was prospecting and this was the level or apex, after I had it lined up on the surface here and found the dip of the vein, I would come over here naturally to find it



—off to the right—but if running on the same slope right along, I would expect it to follow that slope, providing the vein had the same depth after it went down.

Q Then if you were going to take the slope into consideration, lining up with your openings, why would you go to the eastward of where the—of the true line or straight line?

A If the hill didn't have the same slope—if it pitched off quicker.

Q As a matter of fact, you sited down and told Tobin about where you thought he ought to sink, didn't you?

A He had started the hole and asked me and I said I guessed that was about the right place.

Q Did you site?

A Yes sir, I went up hill.

Q When you sited down hill straight, didn't you take in consideration the dip there going about 12 ft. or more, or thereabouts, to the eastward in order to estimate where they would strike the lode?

A No, I don't believe I did.

Q You didn't take into consideration the slope of the vein at all?

A There would not be enough difference to make any variable amount.

Q You didn't take into consideration the dip of the vein at all?

A Not on that slope, no.

Q Have you any idea—it is indicated on the map, and is in the testimony, that the distance between your lower end center stake of the Red Top and the

mouth of your tunnel is 173 ft. Now what is the difference in the elevation on the surface between those two points?

A I don't know the difference.

Q Approximately—what would you say?

A All I know is the hill seems to run approximately the same—not enough difference in the slope to make any difference.

Q Isn't the hill quite steep from the lower center end line up to the mouth of the tunnel?

A It is about the same grade—not quite so much as it is from there up hill.

Q From where?

A From the tunnel up hill.

Q I didn't ask that question—I asked you whether or not the hill goes up pretty steep from your lower center end stake up to the mouth of the tunnel—a distance of 173 ft. Don't the hill run up pretty steep?

A Well, it depends on what you call a steep hill—I wouldn't call it a steep hill—a gentle slope all the way.

Q How gentle is it?

A I can't tell you the amount of elevation it has to a hundred feet because I haven't taken it, and if I had to describe it, that is the only way I have to tell you.

Q You don't know whether to call it a steep hill, or not?

A It may be what some people call a steep hill, but I don't call it steep.

Q But from the mouth of your tunnel up hill to

your discovery shaft, marked on the map, the grade is about the same as it is between the lower end center stake and the mouth of the tunnel?

A No, I think the grade is a little steeper up hill.

Q From the mouth of the tunnel up?

A I think it is.

Q Not much?

A I don't know how much.

Q Well, the lower part—the lower half approximately, of the Hillside Bench Claim, as originally staked, is flat compared to the upper part of it, is it not?

A Yes, the lower half is flat compared with the upper half.

Q Up hill somewhere near Tobin and Campbell's shaft the ground begins to raise very materially?

A I think there is quite a slope quite a ways below where Tobin and Campbell sunk too.

Q It is quite a slope, isn't it? As the testimony shows, that is quite a steep hill along where you are contradicting.

A No, I am not contradicting—I have never taken it, but it is not what I would call a steep hill—if I had to describe a hill, it is not what I would call a steep hill.

Q How many locations—how many quartz location claims have you in the Kantishna?

(Mr. Roth enters objection to the question. Objection over-ruled.)

Q You may answer the question—how many quartz locations have you in the Kantishna Mining district?

A Do you want to know how many I own personally?

Q Yes.

A I would have to have a little time to study it up.

Q Take your time.

COURT: Give it approximately.

A I think personally I have about eight or nine locations.

Q Quartz locations?

A Yes sir.

Q Then besides that—how many quartz locations in which you have an interest, besides that?

A That is in the vicinity of Eureka, you mean?

Q No, within the boundaries of the entire Kantishna precinct.

A I have an interest in twenty-seven claims.

Q Twenty-seven quartz claims?

A Yes sir.

Q Besides the eight or nine?

A No sir, counting the eight or nine I own.

Q Counting the eight or nine, you have twenty-seven quartz claims you are interested in in that vicinity?

A Yes—no, not in that vicinity.

Q I mean in the Kantishna precinct?

A In the Kantishna precinct, yes.

Q Twenty-seven, you say?

A I think it is twenty-seven.

Q Have you any interest in any placer claims in that precinct?

A No sir.

Q Have you any interest in the ownership of the



Silver King Lode claim of the defendants?

A The Silver King Lode Claim? Where is it situated?

Q That is the claim the defendants claim to own in this case.

A I have not.

Q Have you advanced any money for the purpose of carrying on this law-suit?

A I have not.

Q Have you loaned Campbell any money? Does Mr. Campbell owe you any money at this time?

A He does not.

Q Does Mr. Tobin?

A He does not.

Q Does Mr. Roth?

A He does not.

Q Did you put up money to pay Mr. Roth's attorney fees in this case?

Q Did you advance any part of it?

A I did not.

Q You say—have you had any permission directly or indirectly—or an interest in this Silver King Lode Claim of defendants

A I have not.

Q In the event they win, or otherwise?

A I have not.

Q Have you any option to purchase at any time?

A I have not.

Q But it is true, that across the valley and on the hill opposite to this hill, you have a number of quartz locations, or are interested in them?

A I have two I am interested in.



Q How far away are they from the mouth of your tunnel on the Red Top?

A I don't know—I would guess they would be in the neighborhood of one mile.

Q One mile away?

A Yes sir.

Q If those quartz claims that you say you have, or are interested in which are one mile away on the opposite hill, prove to be a continuation, or part of this same lode, you hope, do you not, to acquire the claims intervening?

A I do not—I have all the claims I can handle.

Q You are known as the principal claim owner in that country?

A I don't know as I am.

Q The Kantishna millionaire?

A I never heard of it.

Q Do you know of any one in that country that owns an interest in any more quartz claims than you do?

(Mr. Roth enters objection which is sustained)

Q In answer to one of Mr. Roth's questions, you stated in substance that the vein or lode which you uncovered between the mouth of your tunnel and what is known and indicated on the map as "Quigley's discovery", was a well known vein, did you not?

A Between the tunnel—

Q Yes, between the mouth of the tunnel and your discovery.

A I would consider it.

Q And that it was a well known vein at the time Campbell and Tobin entered on the ground in con-

troversy in May, 1921? That is true?

A I think it was.

Q And you have also stated that the mouth of the tunnel and some other holes disclosing the vein were south of the upper side line of the Hillside Bench Claim?

MR. ROTH: He didn't so testify—he said he didn't know where it was.

Q I will ask you now whether or not you stated that a part of the well known vein that you spoke of above the mouth of your tunnel—did you testify that it was below or south of the upper side line of plaintiff's bench claim?

A I didn't testify as to that.

Q You testified it was south and below this line—this blue line as indicated on the map.

A As indicated on the map—that is, if they got the holes put on the map as they are on the ground.

Q I believe you have already testified when you were on the stand before, that the distance between your lower end line of the Red Top and the mouth of your tunnel was a distance of over 100 feet. You didn't know how much, but somewhere between 100 ft. and 200 ft.

A I didn't know what the distance was—it may be more or less.

Q It is indicated on the map as being 173 ft. You think that is approximately the right distance?

A I don't know—it may be—I never measured.

Q I know you never measured—but is it about right?

A Approximately it may be—it may be consid-

erably less and it may be over.

Q Well, it is over 100 feet?

A I should judge it would be somewhere.

Q According to that, it would be approximately 200 feet between Campbell and Tobin's discovery and the mouth of your tunnel. You think it is about that? That is according to both maps, as I understand.

(Mr. Roth enters objection on the ground that it is not a fact as shown by the other map. Court understands it was not a question by counsel but a statement. Mr. Roth states that maps show for themselves.)

Q Do you know of the uncovering or of the existence of any place between the mouth of your tunnel and the Campbell and Tobin shaft where the vein is exposed?

A I do not.

Q Then, before or at the time Campbell and Tobin entered upon the ground to prospect on this Silver King claim, there was no known vein that was known to exist between the mouth of the tunnel and the place where Campbell and Tobin sunk, was there?

A I never dug below the mouth of the tunnel myself.

Q I know you didn't and nobody else did that you know of, did they?

A Mr. Campbell and Mr. Tobin dug before that.

Q Did they dig places before they went on the ground?

A No.

Q I am talking about the time before Campbell and Tobin went there?

A Not to my knowledge.

Q You perfected the location of your Red Top claim before Campbell and Tobin went on the ground, didn't you?

A Yes sir, I did.

Q At the time you located the ground there, you claim you made a valid location, do you?

A I do.

Q You claim now that the Red Top claim, as located by you, is a valid claim?

A Yes sir.

Q Then no part of the ground that was within the boundaries of your Red Top Claim, if it is valid, could be within the boundaries of Grant's placer claim, could it?

(Mr. Roth enters objection on the ground of being irrelevant, immaterial and incompetent, and not true as a matter of law. No action taken by the Court on the objection.)

Q Grant never made any claim, after you located your quartz claim, that he owned any ground within your quartz claim?

A He never told me.

Q So far as you know?

A Not so far as I know.

Q You claim he don't own any of the ground within the boundaries of your quartz claim?

A I don't know.

Q You claim to own it, don't you?

A I own the—I claim the quartz.

Q You claim the Red Top Quartz Claim?

A Yes sir.



Q You claim the right to possession of all the ground within the boundaries of your stakes, don't you?

A I claim to own all the quartz within the boundaries of my stakes—that is the way my location calls for.

Q You would have to own some surface rights in order to work a quartz claim, wouldn't you?

A Yes sir.

Q Isn't it true, you claim all the ground—surface and all—within the boundaries of your Red Top Quartz Claim? Isn't it true?

A That is the way my location calls for, I guess.

Q You don't concede at this time that Mr. Grant has any rights within the boundaries of your quartz claim, do you?

A I don't understand that difference between the placer and quartz—I understood the placer had rights to the surface.

Q Within the boundaries of the quartz claim?

A That they had prior—had a right to the placer on the placer claim—and the quartz—I understood quartz and placer didn't conflict—the one don't claim the quartz and the other don't claim the placer—as I understand the law.

Q You don't understand the law very well. Did you—do you know what—about what time of day it was when you and Tobin, in the presence of Mr. Campbell, determined where to start that shaft, on or about the 22nd of May, 1921?

A I think it was some time in the forenoon.



Q Did you say—do you know about how deep they went that first day?

A I don't remember.

Q Do you know whether or not they did some blasting there in order to get through the frost?

A I heard shots.

Q Did you furnish them the powder?

A I don't think I did—I don't remember.

Q You heard some shots that day, did you?

A I am not positive whether it was that day or the next day—they shot at various times.

Q Did you hear them blasting at that point on any—on two or more different days?

A Yes, I heard them blasting probably several different days.

Q Several different days they blasted?

A Yes sir.

Q But you haven't any knowledge about how far they went down the first day?

A No, I have not.

Q Do you know how far they went down the second day?

A I do not. I wasn't keeping track of the distance they were going.

Q Well, you have stated in the light of your experience you have not been able so far to find any quartz vein or lode that runs exactly straight? That is your testimony?

A Yes sir.

Q They are bound to waver and vary from a straight line?

A They vary to a small extent—never any great

extent—according to my experience.

Q You know, as a matter of fact, it is a very frequent occurrence for a vein or lode to run—to turn and go most any direction, don't you?

A I have seen cuts in mining books where it sometimes turns off to a considerable angle.

Q You have seen cuts in mining books where it would turn right around at right angles, or more?

A I don't know as I ever saw such a cut.

Q Aren't you familiar with the case at Leadville, Colorado, where the vein makes a regular horseshoe turn in one of the very richest lodes that they have ever discovered in the world? You are not familiar with that?

A No sir.

Q You know, as a matter of general information, that they do turn frequently?

A I don't know except from cuts—except reading mining books—they are liable to turn.

Q That is the only way to find out?

A My experience hasn't been extensive enough to speak as an authority on my own account.

Q You know as a matter of fact, when you strike a lode, you can't tell how far it goes down until you get down? Isn't that true?

A I don't know from experience.

Q You don't know? Now what is your answer? Don't you know how to answer that? Do you mean to say as far as you are able to say, you know of no way of determining how far a lode runs down into the ground without sinking down on it? Is that your answer?

A I know from authorities I get from mining books that a fissure vein is supposed to be of continuous depth.

Q How far is a fissure vein supposed to go down—how far?

(Mr. Roth objects to the question as immaterial, irrelevant and incompetent. Court rules that witness may answer, if he knows. Objection over-ruled.)

Q You just said from your reading, as I understand, that whenever you find a fissure vein—a true fissure vein—it is supposed to go down—(interrupted)

A They are supposed to go down more consistent than other veins.

Q But you couldn't tell how far it is supposed to go?

A No, I couldn't tell.

Q Isn't that same thing true, with regard to the value of the vein?

A Yes sir.

Q There is no way of telling whether the vein gets more valuable or less valuable as you go down on the vein?

A No sir—it would save me lots of work if I could tell.

Q It might get richer, might it not?

A Yes sir.

Q And it might get poorer, or it might remain the same?

A That is the way I understand it.

Q In going across country along the surface there is no possible way to tell how far a lode ex-

tends until you demonstrate it?

A Not that I know of.

Q A lode across the country or across a claim, going in a certain direction, may stop at any time? Isn't that true?

A A lode may fault—something of that kind.

Q Pinch out—cease to exist?

A Possibly—they all cease to exist some time.

Q It might be a foot away, or miles away? Isn't that true?

A It is true as far as I know.

Q Isn't also true, that unless you open a lode or vein up, there is no way of telling whether it is the same vein or not? Isn't it?

A There is no way of telling positively, I guess.

Q When you speak of the strike of a lode, you mean the direction of the lode, don't you?

A Yes sir.

Q Some time in—Mr. Roth asked you whether or not a certain conversation took place between you and William Grant in the presence of 'Big Sandy' or Sandy Burr, some time in August or September 1920, while you were working on the Red Top Lode Claim, and you replied that that conversation that he read took place. Now, go ahead and give that conversation and tell us just what was said.

A I will have to tell you in substance.

Q I don't expect it exactly.

A Mr. Grant come along and asked what I was doing. I told him I dug up a pretty nice looking prospect.

Q Was that near your discovery shaft?



A It was somewhere near—between the tunnel and discovery shaft—and I told him I had dug up a pretty nice looking prospect—I sprung it on him more as a josh. I says—I told him I was kind of wanting to see him to get a building site as I had got tired of living on the hill. He told me, alright, I could have a building site providing I turned the work done there in as assessment on his placer claim. I told him I didn't think where I was working there was on the placer, and he says, "oh yes, it is—see that stake up there?"

Q What stake was that?

A The stake that stands above my house.

Q What is indicated as the stake number?

A I don't know the number.

Q The northwesterly corner?

A Yes, that would be the one, I guess.

Q You don't know when that was?

A I don't remember the date.

Q Do you remember the month?

A I don't remember the month—wouldn't be positive of the month either—it was shortly after I started work on the claim.

Q Was that all that was said?

A That was about all that was said at that time.

Q Did anybody else say anything in regard to the matter?

A No.

Q That conversation was just between you and William Grant?

A Yes sir.

Q And Big Sandy?



A He was present.

Q Where is Big Sandy?

A Somewhere in the country.

Q You don't know where though?

A He left there that fall—was working at Nenana a year ago, but I don't know where he is now.

Q Did you see him a year ago?

A Yes.

Q In Nenana?

A Yes.

Q Have you seen him since?

A No.

Q That is all you remember about it, is it?

A Yes sir.

Q When was it, if at all, that you wanted Grant to give you a bill of sale to that property?

A That was sometime afterwards.

Q About when?

A It was—I don't know the date—the same as the other—it was some time before Mr. O. M. Grant started doing assessment work on the placer.

Q It must have been some time prior to November 1920?

A It was prior to that time, yes.

Q You made a proposition to O. M. Grant that he should give you a bill of sale?

A Yes sir.

MR. ROTH: You mean Billy Grant?

Q I mean Billy.

A Yes sir.

Q That was some time prior to the time O. M. Grant did the assessment work?

A Yes sir.

Q How long prior?

A I don't know.

Q About how long

A I don't know—it was some time between the time I had started—sometime between the time I saw him—

Q You mean it was some time after September 1920?

A It was some time after I spoke to him on the first occasion about a building site.

Q Was it after you built your house?

A No sir.

Q Was it before you built your house?

A It was.

Q How long before?

A Quite a long time before I built the house. I think I built the house in January—I think it was January.

Q January 1921?

A Yes.

Q Now it was before that that you asked Billy Grant to give you a bill of sale

A Yes sir.

Q Where was that conversation?

A That was on the Red Top.

Q The same place that this other conversation?

A No, it was up hill—was working on another hole further up hill.

Q And you told Billy Grant that if he would give you a bill of sale so as to get the property in your

care, you would keep up the assessment work on the claim?

A I told him I understood he just wanted it for a building site, and told him, "If you will give me a bill of sale of the claim, I will keep the representing done, and you can build there."

Q In other words, you were perfectly willing to keep up that ground as a placer mine and let Billy Grant put up buildings as he wanted to?

A I would have gone to work sinking on the placer below.

Q What for? For the purpose of discovering a lode or for the purpose of discovering placer?

A For the purpose of discovering either one.

Q So you wanted that claim bad enough, if Billy Grant would give it to you—you would hang on to the claim and if he wanted to put up buildings, he could do it?

A Yes sir.

Q Isn't it true, that it is customary to allow one man or a dozen men to build on a placer claim as long as they don't interfere with the placer mining, and that it is customary not to charge them anything—the same as you claim Aitken did for you on that house that he gave you permission—Aitken gave you permission to put your house there, didn't he?

A Yes sir.

(Mr. Roth enters objection to the question as being irrelevant, incompetent, as well as unintelligible. Objection sustained.)

Q You are a mining man of considerable experience. Did you ever know of any man—one man to

give another man a deed to a mining claim simply for the privilege of putting a building on it?

(Mr. Roth makes objection to the question as not being proper cross-examination. Objection sustained. Mr. Stevens takes exception, which is allowed.)

Q What else was said in that conversation?

A I think, if I remember where I left off—I think that was all that was said.

Q What? That you asked Billy to give you a bill of sale and if he would do so, you would let him build there?

A No, that is not all. When I asked him, he said, no, he couldn't do it—that the ground was Tom Aitken's, that he was working for Tom Aitken and located it for him, and I would have to see Tom.

Q That was long before you built your house?

A Quite a while.

Q If that is true, why did you after that, at the time you started your house, ask Billy Grant for permission to build—and that you say he then told you that it was Aitken's claim and to go and see Aitken? Isn't that true?

(Mr. Roth enters objection as not being proper cross-examination. Court states that the method of examination is scarcely proper and sustains objection. Mr. Stevens takes exception which is allowed.)

Q Mr. Quigley, did you ask Mr. Grant for permission to put your house where it is now located?

A I did not, that I remember.

Q Did you ask Mr. Aitken to put your house where it is now located?

A No sir.



Q Did you ask Mr. Aitken for permission to put any of your buildings where they are located?

A Not where they are located—I just asked him for permission to build and dump.

Q You asked Aitken?

A Yes sir.

Q And when was that?

A That was shortly after Mr. Aitken come over from the Kuskokwim.

Q When was that?

A I don't know the date he arrived.

Q About what time was it?

A I don't know about what date he arrived—some time in the first part of the winter.

Q When was it with reference to the time you say you asked Billy Grant to give you a bill of sale?

A Quite a little while after I asked Billy Grant to give me a bill of sale.

Q After you asked Grant for a bill of sale, it was quite a while after that Aitken came in and you asked Aitken for permission to build. Did you ever ask Aitken for a bill of sale to that ground?

A No sir.

Q Did Aitken give you any permission in writing?

A No sir.

Q He never gave you a bill of sale to the ground?

A No sir.

Q Nor a deed?

A No sir.

Q When you and Hamilton went over to the southeasterly corner of the Grant placer claim,



known as the Hillside Bench, you say you don't know whether Grant went there or not?

A I don't remember.

Q What did you and Hamilton do, if anything?

A The object in going over was that Mr. Hamilton was looking to see if it was his corner line—or his side line rather.

Q That was after Hamilton and Grant had been up to the southwesterly corner of Grant's claim—what is now Grant's claim?

A I guess it is the southwesterly corner—the corner below my cabin.

Q That is, Grant and Hamilton went down to this southwesterly corner of Grant's claim?

A Yes sir.

Q And where were you? You didn't go down there?

A No.

Q Where were you?

A Probably—I couldn't tell just the distance.

Q All I want is an approximate estimate—about. Where were you?

A Over three hundred to four hundred feet—it is hard to tell.

Q And the reason you didn't go over there was you loaned your snowshoes to Grant?

A Yes sir.

Q Grant wore your snowshoes and went over to the initial stake and you saw Grant writing something in the presence of Hamilton?

A I don't know who did the writing—or whether

Hamilton did the writing—and don't know whether any writing was done.

Q Were you watching them all the time?

A No, I wasn't watching.

Q What were you doing?

A Waiting for Mr. Grant and Mr. Hamilton to come over there.

Q When Grant and Hamilton came over to the road they joined you there?

A Yes sir.

Q Did Grant give back the snowshoes?

A Yes sir.

Q Did you put them on when Grant gave you the snowshoes—did you put them on to your feet?

A I don't know whether I put them on right then or not.

Q Didn't you almost immediately go with Hamilton down to what is designated here as corner No. 2?

A Yes sir, we went very shortly afterwards.

Q And you in going used your snowshoes?

A Yes sir.

Q What did you and Hamilton go down there for?

A To see if that was Hamilton's corner stake.

Q What interest did you have in knowing whether it was Hamilton's corner stake?

A Mr. Grant had asked me if I would go along.

Q Didn't Mr. Grant ask you to go along with him to be a witness for his staking of the placer claim?

A No sir, he did not.

Q What did Grant say was his object in asking you to go down?

A I don't know what his object was—he asked if I knew where Mr. Hamilton's stake was and I told him, no, he would have to see Mr. Hamilton, and we went over together to see Mr. Hamilton.

Q And you came back together?

A We came back together.

Q Don't you know, as a matter of fact, that that day Mr. Grant, in the presence of Mr. Hamilton, used Hamilton's stakes—adopted Hamilton's stakes and made one of them Grant's initial stake and one Grant's post No. 2?

A I don't know—I suppose that was what it was—I wasn't at the stake.

Q And that was Grant's object—that was why he wanted you along?

A Yes.

Q Well, when Grant went to this corner post No. 4, which would be the northwesterly corner of the placer claim, you were up there with Grant?

A Yes sir.

Q And helped him fasten that stake by piling rocks?

A Yes sir.

Q You know Grant put some writing there?

A I remember him doing some writing.

Q You remember that was intended to be part of the boundary of the Grant Hillside Bench Claim?

A Yes sir, that is what he told me—I didn't know the name of the claim.

Q Placer claim?

A Yes.

Q Mr. Grant testified when you put up that

northwesterly post, corner No. 4, that it was the next day—you say the same day. You are positive it was on the 19th day of April 1920?

A I am not positive of the date.

Q You are positive it was the same day he wrote on the other two stakes?

A I am positive.

Q You are positive Grant did write on this lower stake?

A No—it was the same day.

Q That Hamilton and Grant went down?

A That Hamilton and Grant came to this stake.

Q And one wrote something?

A I don't know—I suppose they did—I understand that is what they went over for.

Q You have no knowledge of when corner No. 3, which would be the northeasterly corner of Grant's placer claim, was established?

A I have no knowledge?

Q Mr. Quigley, the day that Hamilton and Grant were together—the time that they went down—the time we have just been talking about—in the establishment of those two stakes—did you hear Mr. Hamilton tell Mr. Grant in substance that Mr. Grant could use his stakes, or the side of his stakes?

A I heard him say something of the kind, but how it was, I don't remember.

Q He said something to that effect?

A That is as I understood it at that time.

Q Do you remember, as a matter of fact, that Mr. Grant had some stakes prepared and there on the road at that time?



A I don't remember that, but there was some stakes, or some timber—don't know whether stakes or not—on the road that had been lost off a load, or something, and Mr. Grant cut the one stake that he took and put above the house.

Q Were there other timbers there that he didn't use that he might have used?

A I think there was timber there—there wasn't any pile of timber, but there was probably two or three sticks that were over-loaded and lost off—as I remember.

Q Fell off some wagon?

A On the sled trail.

Q So far as you know, Mr. Grant brought those there and didn't use them because Hamilton gave him permission to use his stakes, or the side of them?

A He may have.

MR. STEVENS: That is all.

### **Re-Direct Examination**

BY MR. ROTH:

Q Did Aitken have option to purchase the Red Top Claim?

A He did not.

Q That was not included in the option?

A No sir.

Q You stated in response to the various spirited questions of Mr. Stevens that you came up to my office regularly?

A Yes.



Q Did you come up on business with reference to this trial?

A I did not.

Q The fact is you came up with reference to lodge business?

A I did.

Q Getting instructions from me?

A Yes sir.

Q That is why you were there?

A That is why I was there.

Q How much is the dip of that lead?

A I have never taken the dip.

Q Well, is it much? Is it great or small?

A The dip on the walls of that lead is very irregular—it all has a tendency to dip to the south similar to—that would be an average dip—making a guess, it would be—I don't know what angle—I never tried it.

Q A very small dip?

A Well, it was—(interrupted)

Q That is alright. The quartz claims that you have in the Kantishna country, I will ask you to state whether or not, in acquiring those claims, that you in each instance did the work that was necessary to get each one of those claims that you have.

A Yes sir.

Q You didn't buy any of them?

A I did not.

Q You have ben prospecting in there since 1911 for quartz, as I understand—(interrupted)

A The question you have just asked—I was interested at one time with Mr. McGonigle—him and I

worked together at one time. Some claims that I have now, they was probably located in his name, but in dividing—(interrupted)

Q —you got? Perhaps they had been staked in his name and you got some staked in his name?

A Yes sir.

MR. ROTH: That is all.

### Re-Cross Examination

BY MR. STEVENS:

Q Did you ever stake any mining property for Mr. Roth?

(Mr. Roth enters objection on the ground of being irrelevant, incompetent and immaterial, and not cross-examination. Objection sustained. Mr. Stevens takes exception which is allowed.)

Q Do you own an interest in any property in which Mr. Roth claims an interest in?

A I do not.

Q Do you own any property in your name in which Mr. Roth has an interest?

A I do not.

Q Do you manage any of the business affairs of Mr. Roth in relation to—(interrupted)

(Mr. Roth enters objection to the question as being immaterial. Objection sustained. Mr. Stevens takes exception which is allowed.)

Q Now Mr. Quigley, isn't it true that you advised either Mr. Campbell or Mr. Tobin, or both of them, to go on this ground and sink and locate this claim?

A I did not.

Q Did you advise any one at any time to go on

there and jump that claim?

(Mr. Roth makes objection on the ground of being irrelevant, incompetent and immaterial, there being no evidence of any jumping. Objection sustained. Mr. Stevens takes exception which is allowed.)

Q Do you know Mr. TenEych—Mr. William F. TenEych?

A I do.

Q I will ask you whether or not about two weeks prior to the time that Campbell and Tobin went on this ground and started to sink their hole, if you stated to Mr. TenEych and his partner, Mr. Connelly, in substance, as follows: "Why don't you fellows stake that ground (referring to the same ground that Campbell and Tobin claim to have located), and stated to them that they might just as well stake it as any one else. Didn't you state that?

A I don't remember of any conversation of the kind, Mr. Stevens.

Q You don't remember of making such a statement?

A No sir.

Q Do you deny making such a statement?

A To the best of my knowledge, I never made such a statement,

MR. STEVENS: That is all.

### **Further Direct Examination**

BY MR. ROTH:

Q Did you care who did or who did not locate that claim?

A I did not.

Q Are you concerned—are you perfectly willing that Billy Grant should stake that quartz claim?

A I am perfectly willing.

Q Were you interested in having it worked?

A I was.

Q Why?

O It would have helped develop the property I was working on.

MR. ROTH: That is all.

### **Further Cross Examination**

BY MR. STEVENS:

Q You were interested in having somebody go there and sink a shaft and discover a lode in the hopes of determining whether or not the vein runs down that way for your own benefit?

A It would naturally interest me to know what was there.

Q And you having obtained a dumping ground from Tobin and Campbell, and didn't obtain dumping ground from Billy Grant, then for that reason you would rather have Campbell and Tobin on that property than Billy Grant who didn't give you dumping ground? Isn't that true?

A It is not true.

Q That dumping ground is worth something?

A Yes, it is worth something.

Q Whenever you want to start a new tunnel at or near the down hill or southerly end line of your



claim, why you couldn't run your dump at all unless you would get dumping ground below, could you?

A It would be liable to be some years before I ever attempt to run a tunnel down there.

Q When was it you obtained this permission from Campbell and Tobin to dump on their ground?

A It was—I can't tell the date.

Q As near as you can say.

A It was very recently. Could you tell the date, Mr. Roth? (addressing Mr. Roth)

Q Never mind about Mr. Roth, I am asking you about what time.

A Very recently—within the last ten days.

Q You made arrangements with Mr. Roth, did you?

A No sir.

Q Did Mr. Roth have anything to do with the arrangements?

A I don't know who drew the papers up. Mr. Tobin came and told me—I had asked Mr. Tobin as well as Mr. Grant, and Mr. Tobin last summer put me off on the proposition—wouldn't say—told me as far as he was concerned it was allright, but he would have to see Campbell, so Mr. Tobin he saw Campbell and it was perfectly allright for me to dump.

Q And did Mr. Roth speak to you about it?

A No sir, Mr. Tobin came in and volunteered it to me.

Q You asked Mr. Tobin last fall—last year?

A Yes sir.

Q Before their location was made or after?



A I certainly wouldn't ask them before they had their location.

Q I don't know whether you would or not.

A It was after.

Q When you went there and lined up this prospect and indicated to Tobin where to sink, did you say anything to Tobin at that time about getting permission to dump?

A I did not.

Q Did you have it in your mind?

A I did not.

Q That was after you had seen Billy Grant and he had refused to give you permission to dump?

A Billy Grant, as I understand, didn't refuse—similar to Mr. Tobin, he didn't say.

Q After you had talked with Tobin last summer about getting permission to dump on the Campbell and Tobin ground, they finally come to you and said you could have permission?

A Mr. Tobin told me I could have permission, but couldn't do it without Campbell's permission.

Q He afterwards came and told you it was all-right with Campbell?

A Yes sir.

Q What was done? Somebody made out papers, did they?

A Yes sir.

Q Did Campbell and Tobin sign them?

A Yes sir.

Q Did you sign them?

A No sir—I don't know whether I did or not.

Q About when was it they were signed—the papers signed?

A About ten days, I guess.

Q That would be two or three days before this case started to be tried?

A I don't know how long before.

Q Well, we started last Wednesday, a week ago, to try this case—that was two or three or four days before that?

A I don't know the date.

Q You have got a copy of those papers, haven't you?

A Yes sir.

Q I wish you would produce them.

A I haven't them here—think they are in the Pioneer Hotel.

Q In Fairbanks. They are under your control, are they not?

A Yes sir.

Q I would ask that you get those papers. How long would it take to get them?

(Mr. Roth enters objection. Objection overruled.)

Q How long would it take you to get those papers? We ask you to get them at this time, or be able to produce them on incoming of court tomorrow—I want to see those papers. Did you pay any money as consideration for that privilege?

A I did.

Q How much?

A \$10.00.

Q Who did you pay it to?

A Mr. Tobin.

Q Did you pay for making out the papers?

A No sir, I did not.

Q Wasn't the \$10.00 you gave, for the purpose of making out the papers?

A I don't know—I didn't understand it that way.

Q You gave the money to Tobin—just \$10.00?

A Yes sir.

Q You didn't agree to pay him more?

A No sir.

Q You knew at that time that you were going to be a witness?

A I did.

Q You had been subpoenaed by them?

A No, I don't know whether I had been subpoenaed—they had warned me they would need me.

MR. STEVENS: If the court please, we ask that witness be required to produce the paper he spoke of as having been executed by Campbell and Tobin, giving permission to dump on the Silver King Lode Claim.

COURT: He has not indicated that he would have to be required. Are you willing, Mr. Quigley, to go and get those papers?

MR. QUIGLEY: I don't see why those papers should be shown up in this—they have nothing to do with this.

COURT: Are you willing to get them without the Court ordering you to do so?

MR. STEVENS: If the Court please, we ask that the Court require the witness to produce them.

(Mr. Roth enters objection to the introduction

of the papers as being immaterial.)

COURT: Mr. Quigley, will you bring it up in the morning?

MR. QUIGLEY: Yes sir.

Session 10:00 A. M. February 8, 1922.

J. B. QUIGLEY, called as witness for defendants, being heretofore sworn, testified:

**Further Cross Examination**

BY MR. STEVENS:

Q Mr. Quigley, did you bring with you the written agreement, or whatever it was—the instrument concerning the rights you have acquired from the defendants, Tobin and Campbell, to use a part of their Silver King Lode Claim to—as a dumping ground?

A I did.

Q Is this the paper? (Receives papers from the Court)

A Yes sir.

Q Is the instrument that I hand you the one that you described yesterday as having been received from the defendants in this case? (Hands paper to witness)

A Yes sir.

Q That is in the same condition as it was yesterday when you were on the stand?

A The same instrument.

Q Did you talk to Mr. Roth about it since you left the stand?

A I did.

Q Did you talk to Tobin or Campbell?

A No sir.

Q You talked with Mr. Roth?

A I did.

Q There is no change in the instrument?

A No change.

Q Did you find it in the Pioneer Hotel among your papers?

A Yes sir.

MR. STEVENS: If your Honor please (addressing the Court) the plaintiff would offer this instrument in evidence asking that it be marked Plaintiff's Exhibit "G", and of course, are quite willing at any time that the witness withdraw it by filing a certified copy.

(Mr. Roth enters objection to the introduction of the instrument, as being irrelevant, incompetent, and immaterial. Objection over-ruled, and instrument admitted and marked Plaintiff's Exhibit "G".)

Mr. Stevens reads Plaintiff's Exhibit "G" to the jury as follows:

"This agreement made and entered into this  
"31st day of January, 1922, by and between J.  
"L. Tobin and William J. Campbell, parties of  
"the first part, and Joseph B. Quigley, party of  
"the second part, witnesseth: That, for and in  
"consideration of the sum of ten dollars \$10.00(  
"lawful money of the United States, the receipt  
"whereof is hereby acknowledged, the parties  
"of the first part grant and convey unto the  
"party of the second part a right of way, li-  
"cense, and privilege to enter upon and into  
"the northeasterly three hundred (300) feet



"of the Silver King Lode Claim, situated in  
"Kantishna Recording Precinct, Fourth Jud-  
"icial Division, Territory of Alaska, for the  
"purpose of tunneling to remove ore from the  
"Red Top Lode claim belonging to the party of  
"the second part and for dumping, warehouse  
"and storage purposes. In witness whereof the  
"said first parties have hereunto set their hands  
'and seals the day nd year first above written.

J. L. Tobin (Seal)

Wm. J. Campbell (Seal)

"In the presence of

"R. F. Roth.

"E. Coke Hill.

"United States of America

"Territory of Alaska ss.

"This is to certify that on this 31st day of  
"January 1922, at Fairbanks, Alaska, J. L. To-  
"bin and William J. Campbell, to me known to  
"be the individuals named in and who executed  
"the foregoing agreement as first parties, per-  
"sonally appeared before me and each in per-  
"son acknowledged to me that he executed the  
"same. Witness my official seal and signature  
"January 31st at Fairbanks, Alaska.

"E. Coke Hill. Notary public for Alaska.

"(SEAL) My commission expires Feb. 21st,  
"1922."

BY MR. STEVENS:

Q That instrument was executed on the 31st day of January, 1922, it recites. That is the day it was executed, wasn't it?

A I know that is the date now—I didn't notice before.

Q That was the 31st day of January 1922—it was just the day before this suit started. Isn't that true?

MR. ROTH: That appears—it is no use to question.

Q When you stated it was two or three days before the trial of this case commenced, you were mistaken?

A I must have been—the date shows on the instrument.

MR. STEVENS: You may take the witness.

**Further Direct examination.**

BY MR. ROTH:

Q You told Mr. Stevens in cross examination that you asked Mr. Grant for surface rights, also that he didn't give you the rights?

A Yes sir.

Q What did Grant say to you at the time?

A He gave me an evasive answer in this way—he told me that he only owned a half interest and that he would have to see Mr. Stevens.

Q Did you ever talk to Mr. Grant about that since?

A No sir.

Q I will ask you to state whether you are still interested in getting rights from Mr. Grant?

A Yes, I am.

Q You told Mr. Stevens that you were interested altogether in about twenty seven quartz claims in the Kantishna district?

A Yes sir.

Q Mr. Quigley, I will ask you to state whether or not—how much work have you done in the Kantishna district on quartz claims?

(Mr. Stevens objects to question as immaterial. Objection over-ruled.)

A I have been working since 1911—I have been working continuously.

Q But how much have you done—what work did you do?

A Well, I got about—something over eight or nine hundred feet of tunnel driven in the country besides lots of surface excavations.

Q Who is it—who are the people that developed that country over there and determined that it was a quartz country?

(Mr. Stevens objects to the question as not being proper re-direct examination. Objection sustained.)

Mr. Roth states that he forgot to ask Mr. Quigley one question when on the stand before.)

Q Down there where these defendants sunk that discovery shaft on the Silver King Lode Claim—I will ask you to state whether or not there had been a fresh hole or shaft sunk in the immediate vicinity of that discovery shaft either—I mean in that same year, 1921,—either before that shaft was started by Campbell and Tobin or before they had completed

that shaft to bed-rock.

A Not to my knowledge, there was no fresh hole sunk.

Q Would you have known, if there had been?

(Mr. Stevens enters objection which is sustained.)

Q Were you there all the time?

A I don't know—I was there practically all the time—don't remember being away more than a day or two any time.

MR. ROTH: That is all—Oh, I want to ask you about this Plaintiff's Exhibit "G" just introduced in evidence, which is the document giving you surface rights by Campbell and Tobin. Who suggested giving you a writing?

(Mr. Stevens makes objection as being immaterial. Objection over-ruled and Court instructs witness that he may answer. Exception taken and allowed.)

Q Who suggested that that be put in writing?

(Mr. Stevens again makes objection on the same ground. Objection over-ruled. Exception taken and allowed.)

A Mr. Tobin.

MR. ROTH: That is all.

### Further Cross-Examination

BY MR. STEVENS:

Q In answer to Mr. Roth's question on re-direct, you said something about a conversation between you and plaintiff Grant, wherein you wanted to se-

cure dumping ground rights from the plaintiff Grant?

A Yes sir.

Q And that he told you he would have to see Mr. Stevens? Is that right?

A Yes sir.

Q When was that—about?

A That was some time during the summer.

Q What summer?

A Last summer.

Q And about what time?

A I think along in August—maybe before August, or it may have been September—but during the summer sometime.

Q Why did you go and ask Grant for permission to dump on that ground if Grant had already told you that the ground belonged to Aitken and that Aitken had already given you permission to build there, as you heretofore testified?

A I understood that Mr. Grant—that Aitken had transferred it or that Mr. Grant claimed an interest different from what he told me before, and to secure myself both ways—I knew there was a controversy and I wanted the rights from either one.

Q You knew there was a controversy between whom?

A Between Mr. Campbell, Mr. Tobin and Mr. Grant.

Q You didn't know of any controversy between Mr. Grant and Mr. Aitken?

A I didn't know how it stood.



Q You didn't know of the existence of any controversy between them?

A No sir. I understood Mr. Grant had got it from Mr. Aitken, but I never knew. I understood he claimed it now and so I wanted to get his permission.

Q What did you understand—how did you understand Mr. Grant had acquired title from Mr. Aitken?

A I don't know how—any more than by report.

Q Did you go to the Recording Office to see?

A I never did.

Q You never found any transfer from Grant to Aitken, did you?

A No sir, I never looked.

Q You knew Grant had staked in his own name?

A I understood so.

Q You didn't know of the existence of any transfer from Grant to Aitken?

A I did not.

Q And no transfer from Aitken to Grant?

A I did not.

Q And the Recording Office is less than half a mile distant from your house? Isn't it?

A It is one-half to three-quarters of a mile. It seemed to me quite evident that Mr. Aitken had turned it over to Mr. Grant.

Q What evidence did you have?

A Mr. Grant seemed—as I understood, he claimed the ground then and Mr. Aitken had released his rights.

Q How did it seem to you that way—or did you dream it?

A I just had it from Mr. Grant.

Q What did you have from Mr. Grant?

A He told me it was his ground.

Q When?

A Later on.

Q When?

A After Mr. Aitken left camp, Mr. Grant stopped there and seemed to claim the ground.

Q Where? Where did such a conversation take place?

A Right on the hill—he told me several times he claimed the ground.

Q That was after he told you it was Aitken's?

A Yes.

Q Did you know from this about how he got it back from Aitken?

A I supposed it was transferred back.

Q Did you ever tell Mr. Roth about that?

A No sir, I didn't.

Q And yesterday when asked so many questions, why didn't you tell that?

A I don't remember any question that lead up to that.

Q Isn't it true that Mr. Grant never mentioned my name in connection with this ground when you and he talked there?

A No sir—he mentioned your name.

Q He mentioned my name?

A Yes sir.

Q That was in August?

A July or August some time.

Q About what day?

A I don't know the date—during the summer.

Q Was that before or after I told you in Mr. Roth's office that Mr. Grant had brought this suit?

A I don't believe I ever met you in Mr. Roth's office.

Q In the courthouse downstairs?

A I don't believe I met you in the courthouse downstairs.

Q You said yesterday you remembered.

A No sir.

Q My question comprehended—(interrupted)

A As I understand, if I remember when Mr. Roth introduced us—(interrupted)

Q Where was it he introduced us?

A I think it was right out on the corner.

Q What corner?

A Right out of the courthouse door—think it was on the opposite corner in the square somewhere.

Q Now, Mr. Quigley, it is a small matter, but as a matter of fact, don't you remember that downstairs at the foot of the front stairway in the courthouse, I met you and Mr. Roth on the inside of the hall, and that Mr. Roth introduced you and I?

A I don't remember it that way.

Q Did Campbell say I had one-half interest in that claim?

A I don't remember talking to Mr. Campbell.

Q I don't mean Mr. Campbell—I mean Mr. Grant.

A He didn't say you owned an interest—owned one-half interest.

Q One of Mr. Roth's questions was—he asked you about a half interest just a few minutes ago—I mean the one-half interest Mr. Roth says I own.

A I didn't understand it that way.

Q He didn't say what interest I had?

A He did not. I didn't understand whether he meant you had one-half or some one owned one-half.

Q That must have been after this suit was brought?

A It was sometime during the summer.

Q Are you sure he mentioned my name?

A I am sure.

Q This suit was brought sometime in the first part of August.

COURT: The 9th of August.

Q The 9th of August—and it was probably the next day when Mr. Roth introduced you and I—weren't you down about that time?

A I was down sometime in August.

Q And you stayed in Fairbanks something like a week or ten days that time?

A I was here—I don't remember—I think about a week.

Q You couldn't have got back to Kantishna much before the latter part of August.

A Sometime in the latter part.

Q Then it was after that you had this talk with Mr. Grant?

A I don't know positively.

Q Was it before you came in town?

A I am not positive about the date.

Q Mr. Grant didn't say anything about owning an interest—he didn't mention my name?

A Yes sir.

Q He didn't say I had any interest in it?

A I don't remember it that way.

Q Or he didn't say he had promised me any interest?

A No, I wouldn't say.

Q He didn't say anything about my interest—simply said he would have to see me?

A He said he would have to see you.

Q Did he say anything about Aitken owning an interest?

A No sir.

Q You are a mining man—you wouldn't expect any honest man to think a lawyer ought to try a case of this importance for nothing, do you? You wouldn't expect a lawyer to work for nothing?

A I never considered that.

Q Do you, as a mining man, think it perfectly legitimate for a mine owner to give a lawyer an interest in a claim, if he hasn't money to pay for it?

(Mr. Roth objects to question as being immaterial. Objection sustained.)

MR. STEVENS: That is all.

MR. ROTH: That is all.

JOHN BUSIA, called as witness for defendants, being heretofore sworn, testified:

### **Direct Examination**

BY MR. ROTH:

Q Where were you working during the month of June—no, during the month of May last year, which would be 1921?

A For Joe Quigley.

Q What doing?



A Driving a tunnel for him.

Q Do you know William Campbell?

A Yes.

Q Do you know Mr. Tobin?

A Yes.

Q Did you see them do any work close to Quigley's tunnel where you were working?

A Yes.

Q What did you see them doing?

A Sinking a shaft.

Q Did you—were you there when they commenced to sink?

A I was 300 to 400 ft. away on the ground when they started to work.

Q You were there the same day?

A Yes.

Q Did you hear them work there or what did you hear around there?

A I never heard them working, but I see them.

Q Did you hear them blasting?

A Yes.

Q You heard blasting?

A Yes sir.

Q How many blasts the first day?

A Once in the forenoon—am not sure, one or two shots.

Q Did you go down to their shaft the evening of the first day they started work there?

A Yes.

Q Were you there when they were working that day?

A They just quit when I got down there.

Q How deep were they at that time?

A Between six and seven feet.

Q Are you sure that was the first or second day?

A I am sure it was the first day.

Q What kind of a looking shaft did they have at that time—what size was it?

A It was probably 3½ feet wide—and I couldn't tell exactly how long—never guessed very close.

Q Did you see a hole close to that one that they started?

A There were several holes around there, but I never paid attention to how close they were to the shaft.

Q Did you see one when you stood at the shaft there that Campbell and Tobin were sinking, and looking back to the—towards the Quigley tunnel on the right hand side—did you see a hole?

A Well, I remember one hole is towards the south but a little below.

Q That is up Moose Creek?

A Yes.

Q How close is that one to the one they were working in?

A I believe fifteen or twenty feet.

Q What was the condition of that hole at that time?

A I never looked.

Q Do you know whether it was an old hole or a new one?

A I believe it is an old hole.

Q Do you know whether there was any water in it?

A I don't know—I never looked at it—was never right close to the hole.

Q Just tell the court whether or not this hole that you saw Campbell and Tobin in the first evening they were working there—if that is the same hole they worked in afterwards?

A Yes.

Q Do you know whether or not they went into any other?

A Not since I come there the first day.

Q Did that hole you saw them working in the first day there look like a new hole or an old hole sunk the year before?

A It looked to me like a new hole—am not sure—when throwing out fresh dirt, it looks like a new hole.

Q Was it straight down from the top?

A I never paid attention after the first foot or two—from there down it was a square hole.

Q Did it have any appearance of sloughing in at all?

A I never examined it at all—never paid attention.

Q Now, you stated that they were six or seven feet deep?

A Yes.

Q I understood you to say before it was three feet deep the first day.

A I never said that.

Q Did you ever go and examine—oh, did you ever see any new hole around there besides this one Campbell and Tobin sunk in that time?

A No, I don't think I see any—never looked for any.

MR. ROTH: That is all.

### Cross Examination

BY MR. STEVENS:

Q You say you were working in the tunnel—Quigley's tunnel—the day that Campbell and Tobin started to work there?

A Yes.

Q And when did you—where were you when you heard the shots?

A In the tunnel.

Q And when did you come out?

A By noon.

Q Did you see Campbell and Tobin there when you came out at noon.

A They was there, yes.

Q Did you go down where they were working at noon?

A No.

Q When you got dinner, did you go back in the tunnel the same day?

A The same day.

Q When did you come out of the tunnel again?

A I wheeled out dirt for three-quarters of an hour and went back again, and stayed until five o'clock.

Q You quit at five o'clock?

A Yes.

Q You came out of the tunnel at five o'clock?

A Yes.

Q When you came out of the tunnel at five o'clock, did you go down to where Campbell and Tobin were sinking?

A Yes.

Q Were they there?

A Yes.

Q Was that the same place they afterwards went on down to bed-rock?

A The same place.

Q Did you have any—when you first went there, where was Campbell?

A Campbell was with Tobin alongside the hole.

Q Campbell was alongside the hole—not in the hole?

A No.

Q Where was Tobin?

A In the hole.

Q When you came up there?

A Yes.

Q Was the hole deeper than the length of Mr. Tobin?

A Something about ten or twelve inches over his head.

Q Tobin was standing in the bottom of the hole and it was something like ten or twelve inches above his head to the mouth of the hole?

A Yes.

Q Did you see Tobin come out of the hole?

A Yes.

Q How did he get up?

A He put up a pick on the corner of the shaft,



stepped one foot on the pick and give his hand to Campbell.

Q Tobin stuck a pick in—he leaned a pick against the hole and stepped on the pick?

A Yes.

Q And Campbell reached down and give him a hand?

A Yes.

Q And helped him up?

A Yes.

Q Was anything said at that time by you or by either one of the defendants about the hole or what they had done?

A Just told them for a joke, I says, "You fellows do more work in one day than I do in a week."

Q Who said it?

A I said it to him.

Q To who?

A To both of them.

Q You said in a joking way that those fellows did more work in one day than you did in a week?

A Yes.

Q What did they say?

A Nothing—just laughed.

Q Do you remember any other conversation?

A No.

MR. STEVENS: That is all.

### **Re-Direct Examination**

BY MR. ROTH:

Q Did you go down there pretty regularly every day to see them?

A Yes.

Q Every day?

A Not every day, but don't think I missed more than one time.

MR. ROTH: That is all.

MR. STEVENS: That is all.

GEORGE BLACK, called as a witness for defendants, but is not present.

JOSEPH DALTON, called as a witness for defendants, being duly sworn, testified:

### **Direct Examination**

BY MR. ROTH:

Q What is your name?

A Joseph Dalton.

Q Where do you reside?

A In the Kantishna.

Q How long have you resided there?

A Seventeen years.

Q Are you acquainted with William Grant, the plaintiff in this case?

A Yes sir.

Q Are you acquainted with William Campbell, one of the defendants?

A Yes sir.

Q Are you acquainted with Mr. Tobin, one of the defendants?

A Yes sir.

Q Are you acquainted with O. M. Grant?

A Yes sir.

Q Where do you reside?

A I live at the mouth of Eureka in the Kantishna.

Q Are you acquainted with the Red Top Lode Mining Claim?

A Yes.

Q Do you remember when discovery was made on that claim?

A Yes.

Q Have you kept in touch with the work done on the Red Top?

A Yes, I have.

Q Are you any ways interested in that claim?

A No, I am not.

Q Are you acquainted with Joseph B. Quigley?

A Yes.

Q How long have you known him?

A I have known him about twenty years.

Q Do you—are you acquainted with the Silver King Lode claim that adjoins the Red Top Lode Claim?

A Yes.

Q Were you present there on the day that the discovery shaft was started on that claim by these defendants?

A Not on the day.

Q When did you first see it with reference to the time it was started?

A I don't know whether it was started that day or not—it was down about four or five feet when I went by in the morning.

Q Do you know whether or not the lode that had been discovered on the Red Top Lode Claim by Joseph B. Quigley was a well known lode in that mining district?

A Yes, I do.

Q Was it?

A Yes.

Q At the time that these defendants started their shaft on the Silver King Lode Claim, to what extent had that lode that Quigley was working on—to what extent was it known in that mining district?

A He had a line of holes probably in line about 700 or 800 feet, and there was rock across two claims staked across the river.

MR. STEVENS: We move that the answer be stricken out. The question was to what extent was it generally known, that is, the lode Quigley located.

MR. ROTH: He was answering that question.

MR. STEVENS: I assumed you meant the Red Top Claim.

MR. ROTH: I am talking about that lode—to what extent known.

COURT: I think that was your question.

MR. ROTH: To what extent was that lode upon which Quigley worked—to what extent was it generally known to exist in that mining camp at that time?

(Mr. Stevens enters objection. Objection sustained. Mr. Roth takes exception which is allowed.)

BY MR. ROTH:

Q Did you make it your business to ascertain whether or not this lode upon which Mr. Quigley made his discovery extended through the country?

(Mr. Stevens enters objection on the grounds first, being leading and suggestive; second, immaterial and improper examination. Objection sustained. Mr. Roth notes exception which is allowed.)

Q Mr. Dalton, I will ask you to state whether or not this same lode at that time was known to exist across Moose Creek from the Red Top Lode Claim.

(Mr. Stevens objects to question in that it asks for a conclusion, there being only one way to demonstrate it and that is to open it. Court directs that question should be directed to witness as to whether it was known by him, and cross examination on facts on which he bases his statement.)

Q Was that same lode known to you to exist on the other side of Moose Creek from where Mr. Quigley located it?

(Mr. Stevens further objects to question in that it asks for a conclusion of the witness. Objection over-ruled. Exception noted and allowed.)

A Yes, to the best of my knowledge.)

(Mr. Stevens moves that answer be stricken out as witness does not show he has any knowledge. Motion denied. Exception taken and allowed.)

Q How well acquainted were you with the ground where these defendants started that shaft, Mr. Dalton,—I mean on the Silver King Lode Claim?

A I have known it for years.

Q Did you see it frequently about the time they were working there?

A Yes.

Q How did it come you saw it frequently?

A I passed by there every morning going to work and evenings sometimes—probably five mornings out of a week.

Q Where were you working?



A I was working on the lode claim—on Quigley's lode.

Q State whether or not you know that these defendants continued to work in that same shaft until they bed-rocked it, or whether they were working in any other hole in that immediate vicinity?

A In the same hole until they got to bed-rock.

Q State whether or not you noticed a hole in close proximity to that shaft they sunk.

A Yes, there was one about fifteen or twenty feet from it.

Q What direction from the shaft?

A Up river.

Q Up Moose Creek?

A Yes, up Moose Creek.

Q Standing at their shaft and looking up at Quigley's tunnel, which side of you would it be on?

A The right hand side.

Q And how far do you say it was away?

A I don't know—I never measured—probably fifteen or twenty feet—maybe not that.

Q What was the condition of that hole at that time?

A There was water in it—it was dug the fall before and caved in from the top.

Q Tell the jury whether there was any other new hole in the immediate vicinity of this shaft—that is, within twenty or twenty-five feet of this shaft that these defendants were sinking at the time, or during any of the time that they were sinking that shaft.

(Mr. Stevens enters objection. Objection overruled. Exception taken and allowed.)

A There was no other hole there.

Q I mean a new hole?

A No.

Q I will ask you to state whether or not on the 9th or 10th day of November, 1920, in your cabin on Eureka Creek, yourself and O. M. Grant being present, if the following conversation took place in substance, in which you asked O. M. Grant why he didn't bottom one of those holes on the Hill Bench and pick up Quigley's lead, and to which he replied that he suggested to Billy Grant to put a windlass on and bottom it, and he (O. M. Grant) could get his partner, Frank Giles or Childs, to help him, and they would pick up that lead, and that he (Billy Grant) said, "To hell with it, you might have to go 100 feet" and that he was not holding it for mining purposes—that he was holding it for Aitken for a warehouse site?

A Yes.

Q In the month of January of this year, which would be last month, did you go on to the ground which is known and designated as the Hillside Lode Placer Claim with—I mean the Hillside Bench Placer Claim—with William J. Campbell and Jack Tobin?

A Yes, I did.

Q How did you come to go there?

A They asked me to go there and help measure the claim.

Q Did you assist in the measurements?

A Yes.

Q Where did you commence to measure?

A Commenced at the northeast post.

Q You call it the northeast?

A The northwest post.

Q It is designated as the southwesterly post you commenced at.

A Yes, this corner here. (Indicating on map)

Q Did you examine the stake there?

A Yes.

Q Whose stake was it, if you know?

A It belonged to Jack Hamilton.

Q What was written on the stake?

A I couldn't read anything on it.

Q What kind of a stake was it?

A A green cottonwood cut about eight years ago and put in there.

Q From there where did you go?

A Measured over to the south corner post over there.

Q That would be designated, as we have been designating it, as the southeast.

A The southeast.

Q What was the distance between those two—have you a memorandum in your pocket made at that time?

A Yes (Refers to memorandum) 1395 feet.

Q Who did the measuring?

A Me and Mr. Tobin for a while.

Q Did you yourself take note to see that that measurement was correctly made?

A Yes.

Q Now, at that southeast corner, what did you find there?

A Found a post but couldn't read any writing on it.

Q What kind of a post?

A That was a cottonwood post too—the same as the other post.

Q Do you know whose post?

A Yes, Hamilton's post of the bench claim.

Q From there where did you go?

A Went up to measure up to the post over here, (indicating)

Q That is designated the northeasterly?

A Yes.

Q What was the distance to that?

A 605 feet.

Q What is the character of the surface between those two posts?

A It goes up in a grade up hill.

Q Is it steep?

A The first 200 feet is not very steep and the last perhaps 150 feet is steep going up.

Q What kind of stake did you find there?

A A dry spruce stake.

Q What size?

A Probably about three inches square—am not certain of the size.

Q What was written on that stake?

A "N. E. post. Hillside Bench Claim. Billy Grant, Locator."

Q What kind of a stake did it appear to be with reference to age?

A Fresh put in—fresh writing on it—you could



read the writing.

Q From there where did you go?

A Measured from there to this post. (indicating)

Q Which post is that? That has been designated always here as the northwesterly stake—the one above Quigley's house?

A Yes.

Q What was the distance between those two stakes?

A 1296 feet.

Q What was the condition of the surface between those two stakes?

A That was a steep hillside.

Q And where did you measure from there?

A Back down hill.

Q Down to the stake you started from first?

A Yes.

Q What was the distance between those stakes?

A 778 feet.

Q I will ask you to state whether or not those measurements are surface measurements.

A Yes, surface measurements.

Q Did you take into consideration the steepness in making the—(interrupted)

A No.

Q What was written on that stake above Quigley's house there which would be the northwesterly corner stake?

A Couldn't read much of anything—Billy Grant's name—just the bare name and an arrow.

Q Was there anything else on it?

A No, not that you could read.



Q Did you measure the distance from this line between the two posts which you designate as Jack Hamilton's posts, which would be the southerly side line of that Hillside Bench Placer Claim, and the discovery shaft of Campbell and Tobin?

A You mean from here to here? (indicating)

Q Yes, what is that distance?

A 441 feet.

Q Did you measure the distance from the center of the shaft to the line of the—to the lower line of the Red Top Lode Claim?

A Yes.

Q What was that distance ?

A 25 feet.

Q Did you measure the distance from there up to where the lode was exposed in the tunnel?

A Yes.

Q What was it?

A 165 feet.

Q Did you measure the distance from there up to the line between the stake of the Bench Claim above Quigley's cabin and the stake that you designate as a new stake that had plain writing on it?

A Yes.

Q What was that distance?

A 114 feet.

MR. ROTH: You may cross examine the witness.

### **Cross Examination**

BY MR. STEVENS:

Q Did you assist in making this large map on the

wall which has been designated as Defendants' Exhibit No. 2?

A No sir, I did not.

Q Were you present when Tobin was making it, or part of it?

A I was in one night and it was on the wall—think it was done.

Q Where was it?

A In Mr. Roth's office.

Q Since this suit was started?

A Yes.

Q You say you saw Campbell and Tobin working in the shaft that they afterwards put down to bed-rock?

A Yes.

Q You don't know whether it was the first day or not they started—whether it was the day they started or not?

A No.

Q But the time you saw them they were down in the hole about four or five feet?

A Yes.

Q You don't know the date?

A No, I do not.

Q Some time in May 1921?

A Yes, sometime about the last of May.

Q Mr. Dalton, you stated as I recollect, that to the best of your knowledge, the lode, or a lode that you say exists across Moose Creek on the other hill is the same vein or lode that Quigley has uncovered in the Red Top Claim?

A Yes.

Q That is only an opinion of yours that it is the same, isn't that all?

A I asked Mr. Stewart—(interrupted)

Q Never mind. I am asking you if that is your opinion.

A Yes.

Q And you base that opinion upon the grounds that it is practically in line with it? Is that one of the reasons?

A Yes, and from a mining engineer's standpoint.

Q Is it practically in line?

A Yes.

Q Practically a straight line?

A No, there is a dip to it.

Q There is a dip?

A Yes.

Q There is a dip to the vein?

A Yes.

Q Did you take into consideration the dip of the vein in order to ascertain whether it is in straight line with it?

A How is that question again?

Q When you say it is in a straight line, is that line—(interrupted)

A Not exactly a straight line.

Q You said there was a dip?

A All ledges dip.

Q Don't some go straight down?

A Yes, some do.

Q Then they don't all dip? That is true?

A Yes.

Q Sometimes a vein or lode will dip one way and sometimes in another direction?

A Yes.

Q Sometimes a ledge will run in a straight line and sometimes it won't? Isn't that true?

A Yes.

Q Isn't it a very rare occurrence where a lode will run practically straight?

A I never had much experience in quartz.

Q You have been in the Kantishna some seventeen years?

A Yes.

Q Has your experience and efforts been in placer?

A Placer until last summer.

Q Last summer you began on quartz?

A I used to work on quartz in the winter time.

Q You never opened very many veins?

Q No.

Q You have read a good deal about mining quartz?

A Yes.

Q You know it is very frequent that the strike of a vein, or the direction of a vein will be very irregular?

A Yes.

Q They sometimes make a sharp turn and almost go the other way? Isn't that true?

A That I don't know.

Q You have read a good deal on the subject?

A Yes.

Q Does it sometimes occur that a vein will turn

around and go at right angles? You have seen lots of cuts of that?

A No, I haven't.

Q Did you ever read any of "Lindley on Minerals?"

A Have read very little on quartz.

Q You have seen pictures of veins running in various directions? you have seen those lots of times?

A Yes.

Q Then if this particular vein Mr. Quigley has located—if that doesn't run in practically a straight line, why the lode that you say exists across the river on the next hill wouldn't be the same vein, would it?

A That I don't know—I couldn't answer.

Q I understood one of the reasons you thought it was the same vein was because it would be virtually in a straight line with Quigley's?

A I am taking another man's theory for mine.

Q You don't know anything about it yourself?

A No.

Q Has the vein that Quigley has discovered there and located as the Red Top ever been opened up between there and the next hill you spoke of across Moose Creek, with the exception, possible exception of Campbell and Tobin's shaft?

A Well, TenEyck and Connelly have a tunnel in one.

Q Where is that?

A Right below.

Q Where is this tunnel?

A Probably 1500 feet up hill from Moose Creek.



Q How far about is that from the mouth of Quigley's tunnel.

A The two quartz claims and probably a fraction of the other—maybe about 3,100 feet from the Quigley tunnel to Mr. TenEych's and Mr. Connelly's tunnel.

Q Do you know when Mr. TenEych and Mr. Connelly run that tunnel?

A Yes, this winter.

Q That was not run—not started at the time Campbell and Tobin went on this ground and started their shaft?

A No, Hamilton had it staked.

Q Never mind—the question is, at the time, TenEych and Connelly hadn't any work done at all on their tunnel—prior to the time Campbell and Tobin went on this ground?

A No, they hadn't.

Q Prior to the time Campbell and Tobin went on the ground in controversy, had any vein or lode been uncovered across Moose Creek up on the hill there?

A Hamilton done a little work across there.

Q Where?

A On the same place where TenEych and Connelly run this tunnel.

Q Something over 3,000 feet?

A Yes.

Q In the neighborhood of three-quarters of a mile?

A Yes.

Q Had Hamilton done a little work there prior to the time that Campbell went on the ground?

A Yes.

Q How long prior?

A I think he staked in the spring.

Q Away across Moose Creek? Did you ever examine any of that ore?

A Yes.

Q Similar in character, is it—

A Yes.

Q —to the substance that Quigley has taken out?

A That I can't tell—am not expert enough.

Q Do you know of any other place where a lode has been uncovered prior to the time Campbell and Tobin went on this ground, in that vicinity?

A No, I do not.

Q You don't know as a matter of absolute certainty that Campbell and Tobin's lode that they uncovered is the same vein that Quigley uncovered some 160 feet above, do you?

A No.

Q It has never been opened up or demonstrated?

A Only in line.

Q It is simply in line and the same character rock?

A Yes.

Q You believe it is the same lode, don't you?

A Yes, a mining engineer told me it was.

Q I asked if you believed it.

A Yes, I believe it.

Q And mining engineers—it is only a matter of opinion on their part, isn't it?

A Yes.

Q There is no such thing as knowing without opening it up there?

A Mr. Stewart said it was—and that proves it was.

Q Who proves it?

A Campbell and Tobin, they proved it went through.

Q Who is Mr. Stewart?

A A mining engineer.

Q Did he open up a tunnel and find out that it was a continuance of the same lead?

A No, he told me the same lead went there.

Q He told you in his opinion it was the same lead?

A Yes.

Q He don't know any more about it than you do about its actual existence?

A I would take his theory.

Q I will ask you if Mr. Stewart had any knowledge that you know of that it was the same 'ode, any more than opinion and theory?

A No.

Q Mr. Roth asked you about a conversation that took place in your cabin near the mouth of Eureka Creek on the 9th or 10th of November 1920. You remember that conversation?

A Yes, I do.

Q Who were present?

A Me and Mr. Grant—just the two of us present at the time.

Q You don't think anybody else was present?

A No.

Q Mr. Roth asked you about the conversation

where you and O. M. Grant and William Grant, the plaintiff, were present,

MR. ROTH The question did not so state.

Q Who were present? You and Billy Grant were present?

A Me and O. M. Grant.

Q William Grant wasn't there at all?

A No sir.

Q No one was present except you and O. M. Grant?

A No.

Q The mouth of Eureka Creek was not a great ways from this property?

A About one mile.

Q Right down near the Recording Office?

A Yes.

Q Now go right ahead and state what was said and who said it at that time.

A Grant came down there and I asked him what he was doing and he said he was doing assessment work down on the claim below Quigleys. I asked him how far down he went and he said he had one or two holes down—wouldn't be certain—and I asked if he was going down any further. He said no, that he suggested to Billy Grant to put a windlass on and he would get his partner Giles to help and bottom the holes and strike Quigley's lead, and Billy Grant said, "To hell with it, you might have to go 100 feet" and he was not holding it for mining purposes—was holding it for warehouse purposes.

Q Billy Grant was not—you didn't hear Billy Grant say it?

A No, I never did.

Q What else was said?

A I told him the work he was doing was no benefit to the claim.

Q What did he say?

A He said he didn't care—it was his orders to sink the holes.

Q It was his orders to sink lots of holes?

A Yes.

Q What else was said?

A I don't remember any other part of the conversation.

Q Was there anything else said on the subject?

A No, not that I remember—we talked about claims in general.

Q You are satisfied you have given us the substance of the conversation?—do not expect the exact words—you are sure about that?

A Yes, I was anxious for him to go down in the hole and bottom it.

Q That was in November 1920—a year ago last November?

A Yes.

Q Did you make a memorandum of what O. M. Grant said at that time?

A No, I did not.

Q How did it come you remembered so well so long ago?

A I was anxious to see him go down in the hole and pick up that lead.

Q You visited Mr. Roth's office?

A Yes.



Q And told Mr. Roth about this conversation?

A Yes.

Q And Mr. Roth wrote it down at your suggestion?

A Yes.

Q You have a good memory, have you?

A Yes.

Q And you were anxious to find out all you could about the lode at that time?

A What time do you mean?

Q The time you had this conversation with O. M. Grant.

A Yes, I was anxious for him to go down in the hole and pick up that lead.

Q You were interested?

A No financial interest.

Q For that reason you were particular to remember that particular conversation?

A Yes.

Q You would remember any other conversation that you had with any of those parties about the same property?

A Yes sir.

Q Equally as well?

A Yes.

Q And if any conversation was had since that time, you would be more apt to remember?

A Yes, I would.

Q I will ask you, Mr. Dalton, to state whether or not about June 2, 1921, at or near the mouth of Eureka Creek in the Kantishna Precinct, Alaska, at your garden—in your garden on the bank of or near the

bank of Moose Creek, you and O. M. Grant only being present, whether you had the following conversation in substance: that you (Dalton) said that Campbell and Tobin were getting or finding big chunks of high grade in one of your holes (talking to O. M. Grant and referring to one of the holes that O. M. Grant put down for William Grant) about four feet deeper than you went (talking to O. M. Grant) and that O. M. Grant said to you in substance, "What do they want to go into my hole for?" and that you (Dalton) said to Mr. O. M. Grant, "They did start a hole of their own this way (pointing or referring up in an up-stream direction from Moose Creek) from your hole, but the surface water was bothering them and they couldn't get down without timbering, and they wanted to get down and locate the ledge before Billy Grant got back from the Landing (referring to Roosevelt)." You may state whether or not that conversation occurred.

A No sir.

Q At that time and place and in substance, you say that did not occur?

A Not on the 2nd day of June.

Q Did that conversation occur round about that time?

A Not that part—not in substance.

Q I am asking whether or not that conversation as I have stated occurred in substance.

A No, it did not.

Q Did that same conversation occur in substance about that time?

A I had a conversation.

Q Wait a minute—if I am mistaken in the date, that is immaterial—I want to know if that conversation occurred about that time.

A I had a conversation.

Q Answer 'yes' or 'no' whether that conversation occurred in substance about the 2nd of June, 1921.

A No, it did not.

COURT: The witness may answer regarding the conversation—the witness may make any statement voluntarily with reference to the question you ask him regarding this conversation.

A Before they started their hole—I know it was only started some time the last of May, and I was in the garden and talking to Grant—it must have been around the 24th of May that I was talking to O. M. Grant. We had a conversation about staking the claim—first we heard—Tobin had been up to my cabin and I asked him if he was going to sink and he told me he was.

COURT: You may state what the conversation was. You needn't state what Tobin told you.

A I told Grant that Tobin thought he was going down in one of those holes—that he would save 12 ft. if he would go down—before they started a hole.

Q That was when?

A It must have been around the 24th of May I think—about the time I was planting my garden.

Q The 24th of May, 1921?

A Yes, last year—between the 24th and the first of June.

Q Was that conversation in your garden?

A I had several conversations.

Q With who?

A O. M. Grant.

Q Was any one else present?

A No, I don't think so.

Q And you did tell O. M. Grant—did you know at that time that Campbell and Tobin had started?

A No, at that time they weren't started.

Q Campbell and Tobin have both testified they started on the 22nd of May. You say this conversation was on the 24th, so they must have started two days before.

A I wouldn't be certain about dates—it was around the garden somewhere, but I wouldn't be certain about the date—I thought it was around the 24th—I talked several times after they went down—talked about the float.

Q You were discussing with Grant in that conversation what Tobin and Campbell had done with reference to whether or not they had gone down in the hole O. M. Grant had started?

A They led me to believe first that they were going down.

Q Who?

A Tobin.

Q That was before they started?

A Yes, before they started.

Q And did you ever tell anyone they had led you to believe that?

A No, I did not—not after they went down and I see where they started—we all knew they started a new hole.

Q But Tobin had told you he intended to sink in

one of the other holes?

A Yes.

Q The hole that O. M. Grant had started?

A Yes, he said it would save ten or twelve feet.

Q When was it Tobin told you that—how long before Tobin and Campbell started to sink?

A I wouldn't be certain about the date.

Q About how long before? I am referring to the time you say Tobin led you to believe that he and Campbell were going to sink in that hole and save 12 feet.

A I wouldn't be certain.

Q How long was that prior to the time, if you know, that Campbell and Tobin started to sink?

A I wouldn't be sure—over a week anyway—I was up and down to Quigley's working on this quartz, and couldn't tell the exact date—probably two or three days.

Q You told that to O. M. Grant?

A I told him it was their intention, yes.

Q Then it was O. M. Grant that told you that Billy Grant had told him, or had said, "To hell with it"—that is, on the subject of putting the hole to bed-rock, and that O. M. Grant had told you that Billy Grant said he might have to go 100 feet, and he didn't locate it for mining purposes anyway, and that all he located it for was for Aitken for warehouse purposes?

A Yes.

Q That is what O. M. Grant told you Billy Grant told him at that time?

A Yes.



Q And that was on the 9th or 10th of November, 1920?

A Around that time, yes.

MR. STEVENS: That is all.

### **Re-Direct Examination**

BY MR. ROTH:

Q In that conversation did you—that you had with O. M. Grant in the garden, or any one of the conversations at or around your garden near the bank of Moose Creek—did you tell him, O. M. Grant, that Campbell and Tobin were finding big chunks of high grade in one of his holes?

A No, I did not.

Q Did you talk to him about their finding chunks of high grade?

A I did.

Q What did you tell him?

A I told him they were finding high grade as they were going down—he was inquiring what they were doing.

Q Did you tell him they were finding it about four feet deeper than he had gone?

A No.

Q Did he ask you this question, "What do they want to go into my hole for?"

A No, he never did.

Q Did you tell him that they had started a hole of their own, but that they couldn't go down with it on account of striking surface water?

A No, I did not.

Q Did you tell him they were in a hurry to get

down before Billy Grant got back?

A No, I did not.

Q Was it ever in your mind at all?

(Mr. Stevens enters objection. Objection sustained. Mr. Roth takes exception which is allowed.)

Q You said on cross-examination that you were interested in that work done there by Campbell and Tobin?

A Yes.

Q Were you interested in that before they started to work that—on that ground they were working on?

A Yes, I was. Me and Hamilton was talking about staking it.

Q You and Jack Hamilton?

A Yes.

Q How long before these boys put up their stakes?

A Probably two weeks—we figured going half on the ground.

Q What ground do you refer to—Hamilton's ground?

A This ground down here (indicating)

Q What is the name? Horseshoe Bench?

A Yes.

Q What is the next claim below that?

A I don't know.

MR. ROTH: That is all.

### **Re-Cross Examination**

BY MR. STEVENS:

Q You say it was about two weeks before Campbell and Tobin started to sink their shaft that you

and Jack Hamilton were figuring on locating this same property?

A Yes, some time before that.

Q And that in order to do that you were going on Jack Hamilton's placer claim below here, with Hamilton's consent, and sink to see if you could find a lode or vein?

A Yes.

Q And if you found a lode or vein within the boundaries of Hamilton's claim, you understood you could claim 1500 ft. along the strike of the lode or vein from your discovery shaft? Isn't that true?

A Yes, that is it.

Q But you never contemplated going on to Grant's placer claim to sink to find anything?

A We figured it would be too deep there.

Q It is no difference why you figured—you didn't contemplate going within the boundaries of Grant's placer claim to prospect to find the lead?

A No.

MR. STEVENS: That is all.

MR. ROTH: That was because you figured it was too deep and that was the only reason?

A I figured on dumping—if in with Hamilton, I could get dumping ground.

MR. STEVENS: You have to have dumping ground with quartz? It is very important to have dumping ground?

A Yes, you have to have room.

MR. STEVENS: That is all.

MR. ROTH: That is all.

Session 2:00 P. M. February 8, 1922.

JOSEPH DALTON, re-called as witness for defendants, being heretofore sworn, testified:

**Further Direct Examination**

BY MR. ROTH:

Q Mr. Dalton, I will ask you to state whether or not you know a man by the name of John Biglow?

A Yes, I do.

Q Where did you first meet him?

A I met him and Mr. Grant on this claim in litigation—Mr. Grant introduced me.

Q Who were with them?

A Mr. Grant—Billy Grant.

Q No one else?

A No.

MR. ROTH: That is all.

**Further Cross Examination**

BY MR. STEVENS:

Q Where is Mr. Biglow now?

A In the Kantishna.

MR. STEVENS: That is all.

MR. ROTH: That is all.

GEORGE BLACK, called as witness for defendants, being duly sworn, testified:

**Direct Examination**

BY MR. ROTH:

Q What is your name?

A George Black.

Q What was your business in the month of June, 1921?

A Freighting in the Kantishna.

Q How were you freighting in the Kantishna?

A By steamboat.

Q Do you know a man by the name of John Biglow.

A I do.

Q State whether or not John Biglow went with you on your boat up the Kantishna River.

A Biglow—he went with me—I landed at Roosevelt on the 22nd of June according to my book—with Biglow.

Q With Biglow?

A Yes.

Q The 22nd day of June, 1921?

A 1921.

Q When you arrived there, do you know how long John Biglow stayed at Roosevelt?

A We arrived about five o'clock in the morning—he told me he was starting out in a few hours.

MR. STEVENS: Wait a minute—

Q I don't care what he told you—did you see any preparations there to go out at that time?

A I see them getting ready to start.

Q How?

A A fellow by the name of Clark—Biglow told me—(interrupted)

Q Never mind what Biglow told you. How were they getting ready? what were they getting ready?

A They had a team—had two horses, I guess.

Q And a wagon?



A A wagon yes.

Q Did you see him start?

A No, I didn't see him start.

Q Did you see him any more that day?

A I didn't see anything of him.

Q How long did you stay there?

A Left about noon the same day.

Q Do you know Mace Farrar?

A Yes.

Q Did he go with you on that trip?

A No, he wasn't with me.

Q Do you know Dr. Laymon?

A Yes.

Q Was he on that trip?

A No.

Q And Mr. Bob Ellis and his son?

A I don't know Mr. Ellis or his son.

Q Do you know what they did go up on, if they did go up at all?

(Mr. Stevens enters objection to what any of them went up on, except John Biglow who went with him. Court states does not see the connection but instructs witness to answer question. Objection overruled.)

Q Did you see Dr. Laymon and Mace Farrar on that trip?

A Yes, I passed them on the river.

Q Where?

A About twenty-five miles from Roosevelt.

Q Before or after you left Roosevelt?

A After.

Q With whom were they?

A Moody.

Q What time did you leave Roosevelt, did you say?

A On that trip I was up the lake—left Roosevelt at noon the same day for the lake.

Q And where did you go from there?

A From Roosevelt I went up the lake and back down.

Q To Roosevelt?

A Yes, back to Roosevelt.

Q When did you get back there?

A About the 28th of June.

Q And when was it you met Moody?

A Along about the 1st of July I met him.

Q And where did you meet him?

A About twenty five miles below Roosevelt.

Q Which way was he going?

A He was going up.

Q Do you know who was with Moody on that trip—who was with him, do you know?

A Mace Farrar and Dr. Laymon were the only ones I see that I knew.

MR. ROTH: You may cross examine.

MR STEVENS: No cross examination.

RICHARD GEOGHEGAN, called as witness for defendants, being duly sworn, testified:

### **Direct Examination**

BY MR. ROTH:

Q What is your name?

A Richard Geoghegan.

Q Just for the purpose of fixing a date, I will

hand you a document (hands him document), and ask you to state whether or not as a Notary Public you took deposition of William Grant on behalf—I mean of William Campbell?

A I didn't take it as a Notary Public—it was taken before Mr. Mack.

Q Did you have any part in the taking of the deposition?

A I took down shorthand and afterwards wrote it out.

Q During the course of the taking of the testimony in that deposition, was a notice of location handed to you?

A You handed me a notice of location, I believe.

Q And what did you do with it?

A I afterwards made three copies.

Q And what did you do with the copies?

A I think two I delivered to you and one to Mr. Stevens.

Q And what became of the original delivered to you?

A So far as I recollect, it was handed back to you with the copies.

Q Is your mind clear on that?

A No, I don't distinctly recollect the act, but think that it would be the natural thing—I made copies in triplicate and they were given back right away, and I imagine the instrument copied was handed back at the same time.

Q Was that the original notice of location?

A I don't know whether it was the original or not.

Q Did you make a true copy of that document handed to you?

A I did.

Q And the copy you gave me—was that a true copy?

A It was.

Q I will ask you to look at this document and state whether or not you made that, and if so, if it is a true copy of the instrument that you copied from?

A No, I didn't make this, but think I can explain how it was made. I think I dictated from the original to Miss Fisher, or that Miss Fisher made the copy, because this was not written out by me, but by Miss Fisher at my dictation—it is written on the typewriter that Miss Fisher uses.

Q Do you think it is a true copy?

A Yes, I believe it is a true copy of the document handed me at that time.

Q Did you compare it?

A Yes, I compared it with Miss Fisher.

Q With the original?

A With the original, yes.

MR. ROTH: That is all.

### **Cross Examination**

BY MR. STEVENS:

Q Mr. Geoghegan, the paper from which you made this copy—you don't know whether that was an original location notice or not?

A I wouldn't pretend to say—simply copied what was handed to me by Mr. Roth.

Q It was what Mr. Roth stated was a location?

A Yes.

Q Do you know whether or not it was written on any printed form, or not?

A I don't think it was written on a printed form.

Q Do you know whether it was in long-hand or on the typewriter?

A It was in typewriting, I believe—that is my recollection, but I wouldn't swear to it—there may have been parts filled in in long-hand, but I think it was in typewriting.

Q Wasn't it a printed form filled in in long-hand?

A I wouldn't really pretend to recollect that at this time.

Q You haven't any definite recollection of it?

A No, I haven't any definite recollection.

Q You do remember Mr. Roth handed you that paper and requested you to make some copies, and you returned it to Mr. Roth?

A Yes.

Q Your impression is that you did return it to Mr. Roth?

A That is what I think.

Q You are certain you didn't return it to me?

A No, I didn't return it to you.

Q But you did give me a copy?

A Yes, I did give you a copy.

Q And you may state whether or not—just wait a minute—the paper you have now which you say is a copy—that is, which you say you made as a copy—the paper Mr. Roth just handed to you—I Would like to have you hand it to me. (Witness hands Mr. Stevens the document)



MR. STEVENS: We offer this in evidence as part of the cross examination of this witness, and ask that it be marked plaintiff's Exhibit "H".

(Court rules that it may be admitted, if there is no objection. There being none, it is admitted and marked Plaintiff's Exhibit "H".)

Q Mr. Geoghegan, I will ask you to examine that instrument (hands him paper) and state whether or not that seems to be a carbon copy of this other instrument that is Plaintiff's Exhibit "H".

A Yes, it appears to me to be the copy I made, only I think this is the original copy I made, and I think that is a carbon copy—it is the same instrument anyhow.

Q I am going to read Plaintiff's Exhibit "H" to the jury, and I want you to follow to ascertain whether or not what you have in your hand is a copy of this.

Mr. Stevens reads Plaintiff's Exhibit "H" to the jury, as follows:

"(Copy) Notice of location of Quartz Mining  
"Claim. Notice is hereby given, that the under-  
"signed, a citizen of the United States, having  
"discovered at the place where this notice is  
"posted on this the 6th day of June, 1921, a  
"vein or lode of quartz or other rock in place  
"bearing gold and other valuable minerals,  
"does hereby locate and claim the same as the  
"Silver King Lode Mining Claim. The general  
"course of the vein or lode as far as the same  
"can now be ascertained is southwesterly and

"the undersigned hereby locates and claims  
"the same 1470 feet in a southerly direction  
"and 30 feet in a northeasterly direction from  
"the point of discovery, where this notice is  
"posted and a total width of 600 feet, the same  
"being 300 feet on each side of the center of  
"said vein. This claim is situate on the left  
"limit of Friday Creek and the right limit of  
"Moose Creek in the Kantishna Mining and  
"Recording Precinct, Alaska. Notice dated and  
"posted this 6th day of June, 1921.

"(Signed) J. L. Tobin  
William J. Campbell.  
"Locators.

"Indorsed:

"No. 3147. Filed for record at the request of  
"J. L. Tobin and William J. Campbell on the  
"7th day of July, 1921, at 35 min. past 8 P. M.  
"and recorded in Vol. 1 of General page 207,  
"Kantishna Recording District.

"C. Herbert Wilson  
Recorder."

Q Is the copy you have in your hand a copy of what I read?

A Yes sir.

Q That is the copy you handed me at the—after you took the deposition?

A I can not say it is the identical copy, but I handed you a copy.

Q What Mr. Roth has called the original of the paper from which you made this copy—did you ever

see that since you handed it to Mr. Roth, that you know of?

A No.

MR. STEVENS: That is all.

MR. ROTH: That is all.

R. F. ROTH, counsel for defendants being duly sworn, voluntarily testified, as follows:

At the time of the taking of this deposition of Willam J. Campbell in Mr. Mack's office, Mr. Stevens stated that he desired a copy of it, and I told Mr. Goeghegan—it was agreed between Mr. Stevens and myself that Mr. Goeghegan take the original and copy it, and at first I understood that it was to be—that was my recollection at the commencement of this trial—it was to be filed with the deposition, but since then, in figuring the thing out carefully, I remember now it was for the purpose of getting a copy of it that it was delivered to Mr. Goeghegan. I have no recollection of Mr. Goeghegan giving the original back to me. I have made a very careful search in my office among the papers and any other place I thought it might be, for the purpose of finding the original, and I was unable to find it and I don't know where it is now. It is not within my power to get it—I have tried to get it and can't do it, but my recollection is that what was introduced here is a copy of the original. That is all.

### **Cross Examination**

BY MR. STEVENS:

Q You remember that after this case started—in the same day while this case was on trial—the same

day that you and I agreed to have this deposition published—opened—that you met me in the hall just outside of this courtroom and said something in regard to sending down to the Clerk and getting the deposition up here to get that location notice, did you not?

A Yes.

Q And I suggested that you tell the Clerk to bring it up and we would open it? That is true?

A Yes.

Q And when the Clerk opened it, you stepped up to the Clerk's desk and looked for the deposition—I mean looked for this location notice? Didn't you?

A Yes, I expected to find it and was very much surprised that I didn't.

Q You stated in open court that the location notice was with the deposition?

A Well, I don't know that I stated it that strong—I might have said I believed it was where it was, but I was I was mistaken about it, because it was not there, and looking through the deposition, found it was not introduced, but the deposition itself does disclose the fact that Mr. Campbell indentified the signature to it as his signature and the signature of Mr. Tobin to it, as Mr. Tobin's signature—the deposition discloses that.

Q Yes, but isn't it true, you didn't want it to go into the record and, therefore, it was not introduced in the record, but simply we agreed that Mr. Geoghegan could take it and furnish us with copies?

A I didn't object to it going into the record—I might possibly have objected to the original being

put in, but I never objected to the contents of it going into the record, because it wasn't introduced—you didn't offer it.

Q Then, when you stood here at the Clerk's desk looking for that location notice, you thought it was there?

A I have already stated that, Mr. Stevens. I thought it was there and was disappointed in not finding it there.

Q And the first time you ever heard of my being accused of having it was when William Campbell was on the stand, isn't that true?

(Mr. Roth objects to that question in cross-examination. Objection over-ruled.)

Q Isn't that true?

A Yes, I think it is.

Q Mr. Campbell never told you he ever gave that paper to me?

A Yes, he did.

Q Until he said that on the stand?

A No, he said it before.

Q When?

A He said it since he was here, when we were getting ready for the trial here.

Q Then, if he said that, why did you stand here and say before the court that it was in here with the deposition? Why didn't you say, "Mr. Stevens, I want that instrument"?

A Because I didn't think Campbell was right—I thought he was wrong. I told him at the time I thought it was introduced. He says, "no, I think I



gave it to Stevens." And I said, "No, I think it is with the deposition."

Q You didn't believe it was true, and you told the Court and the Clerk and all present that that instrument was with the deposition?

A I thought Mr. Campbell was mistaken—it is not unusual for men to be mistaken.

Q You say Campbell told you that?

A Yes.

Q When did he tell you?

A Well, he told me that a number of times.

Q He did?

A Yes.

Q Didn't you say just a minute ago that the first intimation you had that Campbell claimed he gave it to me was when he disclosed the fact on the witness stand?

A I didn't so intend, and don't think I did.

COURT: Proceed with the examination.

Q You don't think you said in substance within the last five minutes that the first knowledge you had that Campbell claimed that he gave that to me was on the witness stand?

A What I did say was this—in response to your question put to me—that the first time that you were ever accused of having that was when Mr. Campbell stated so here on the stand, and that is true, but that isn't the first time he told me that he gave it to you.

Q Now, Mr. Roth, why didn't you ask me if I had it, or ask me for it when we were talking about it at the door of the courtroom?

A Because I did ask you about it—asked you about it in your office.

Q Didn't the matter come up in my office, and I said I had a copy of the location notice but mislaid it? And didn't I say I probably have two copies, and went through the safe, and said, "Here is a copy."

A Yes, you did.

Q You didn't say anything to me about the original at that time.

A But didn't I ask you if you had the original and the reason—the fact is that Mr. Geoghegan—I went and spoke to Mr. Geoghegan about that in his office, and Mr. Geoghegan told me that he was satisfied he gave it to Mr. Stevens.

Q That original?

A Yes, the original. And I said, "Mr. Geoghegan, I think it was filed with the deposition." I said, "That is my understanding why I gave it to you." He says, "No, I don't think so." He says, "No, I think I gave it to Mr. Stevens," and that is why I asked you about it.

Q In my office?

A Yes, I asked you about it.

Q In my office?

A I just asked for a copy and was satisfied you were all right and you did give me a copy there is no question about that.

Q I had two copies—Mr. Geoghegan gave me two copies—I told you that?

A I think so. You opened the safe and gave me a copy, yes sir. But I want you to understand, Mr.

Stevens, I am not accusing you, and never did accuse you.

Q You don't think I have it now?

A No, I never thought so—I never mistrusted you one minute about that at any time, and don't now—never did.

Q You are satisfied right now that I never had that copy—never went 'south' with it?

A I absolutely think and so stated to Mr. Campbell—there was no doubt in my mind—no occasion to take the original because we had copies, even if you wanted to—I knew you well enough to know you would not pilfer a paper, and never thought so for one minute. But I did ask you, Mr. Stevens, if you had it, because Dick Geoghegan told me he gave it to you.

Q You mean the original notice?

A The original. I was satisfied he was mistaken, and he figured out I was mistaken. Let me ask you a question. Did he ask you if he gave you that?

Q No indeed.

A Because he stated positively the first time that he gave it to you—was sure.

Q After this occurred, I went down and asked Mr. Geoghegan about the matter and he said he had no individual definite recollection of giving it to you, but supposed of course he did. I says, "Are you sure you didn't give it to me?" and he says, "Of course, I didn't give it to you."

A I am telling you what he told me.

Q You don't pretend in this case before this jury that I ever had that original or held it out on you?

A I don't claim there was anything wrong about that notice—it appears it is lost, and according to Mr. Geoghegan, the chances are I lost it.

Q You have known me a good many years?

A I don't think you would do anything like that—I don't think so for one minute.

MR. STEVENS: That is all.

GEORGE MOODY, called as witness for defendants, being duly sworn, testified:

### **Direct Examination**

BY MR. ROTH:

Q Mr. Moody, during the months of June and July of last year, what business were you engaged in?

A I was in the transportation business.

Q Were you carrying mail?

A Yes sir.

Q From where to where?

A From Nenana to Eureka Creek postoffice, Kantishna.

Q At what time did you first land at Roosevelt, that is, the first trip that year?

A Well, I couldn't tell you off-hand.

Q Have you the data with you?

A No sir, I haven't; in fact, I haven't any of that data as I destroyed it in the fall of the year after I was through with the work.

Q Do you know what time you arrived at Eureka postoffice on your first trip?

A That was in the latter part of June—I couldn't say the day.

Q Who were with you—in the latter part of June, you say?

A Yes sir. My mail contract called for delivery of mail any time in June—any time in the month—there was no special date of leaving—think it was the latter part of June because it was late that trip.

Q Can't you come nearer—give me the nearest you can come to the date when you delivered mail there.

A Well, that might have been the 1st or 2nd of July.

Q You say the 1st or 2nd of July?

A Yes sir.

Q Who were with you as passengers on that trip up the Kantishna River, if any one?

A Mr. Ellis and his son, Mace Farrar, George Harrington—

Q Was Dr. Laymon?

A Yes, Doc Laymon.

Q Do you know a man by the name of John Biglow?

A Yes sir.

Q Was he with you on that trip?

A No, I think not.

Q Did you see him after you got into Eureka on that trip?

A No, not to my knowledge. He may have been with me on that trip—Biglow made one trip with me I think, but what trip that was, I didn't keep any track of it.

Q Did you see George Black on that trip? Did you meet his boat?



A I might have.

Q Do you remember whether or not you met his boat a short time before you got to Roosevelt?

A I did on one occasion—I don't know whether that was the first trip or not—it might have been that trip.

Q Would you say that it was not before the 1st of July that you got into Eureka?

A Well, it might have been, Mr. Roth—the only way I can place it, is that I have a recollection of having spent the 4th of July at Roosevelt, and counting back the time it would take to come from Eureka to Roosevelt, and having stayed over there twenty-four hours which my contract called for—must lay over twenty-four hours—it makes it about that time.

Q You spent the 4th of July at Roosevelt?

A To the best of my recollection.

MR. ROTH: You may cross examine.

### **Cross Examination**

BY MR. STEVENS:

Q And that was after you returned from Eureka Creek?

A Yes sir.

Q It is a distance of something like thirty miles from Eureka to Roosevelt?

A It is thirty or thirty-five miles—some call it thirty and some thirty-five.

Q You generally take two days?

A Two days, or two and a half—it depends on the trail.

Q Well then, if you spent the 4th of July at

Roosevelt, you must have been at Eureka Creek the 30th of June, if you count two or two and a half days back—or the 1st of July at any rate.

A We might have been there at that time—I can't state definitely because the days and nights are the same at that time of the year and we traveled part of the time at night.

Q When you went back from that first trip, did Mr. William Grant go with you?

A Yes sir.

Q When you started out from Roosevelt—I mean when you started out at Eureka to go back with the mail to Roosevelt, state what obstruction, if any, you found across the road near Eureka where you started.

(Mr. Roth enters objection to the question as immaterial. Objection over-ruled.)

A Why, I think the only obstruction to the road was a tree cut down across the road down around Friday Creek.

Q Was it on your regularly traveled road?

A Yes, right on the wagon road.

Q Going back to Roosevelt that was?

A That was going from Eureka back towards Roosevelt.

Q And what was on that tree in the way of writing or notices?

A There was a notice—think it was a notice of Grant's—in fact, I know it was a notice of Grant's because I read it when he took it off the tree.

Q Grant was with you?

A Yes.

Q You saw Grant's name on it?

A Yes sir.

Q It had been nailed or tacked up on the fallen tree?

A Yes sir.

Q What did you do—remove the tree?

A I took the notice off—if I remember right, I took it off myself and handed it to Mr. Grant and then moved the tree and got in the wagon and went on.

Q How big was the tree?

A Probably three or four inches in diameter.

Q It had to be removed before you could proceed along the road?

A Yes sir.

Q Then Grant arrived the 4th of July?

A Mr. Grant—we traveled together—Mr. Grant was hauling the mail back.

Q With his team?

A Yes.

Q And was Grant with you—was he in Roosevelt on the 4th of July, 1921?

A Yes, he was if I was.

Q You traveled together until you got to the Landing?

A Yes.

Q Roosevelt is referred to in that country as "The Landing?"

A It is the landing—roads run from there to the creek.

Q It is known as the head of navigation?

A It is the nearest point—that is, where a wagon road goes into the mines.

MR. STEVENS: That is all.

### **Re-Direct Examination**

BY MR. ROTH:

Q Where did you—did you see where the tree had been cut?

A The tree was just slashed—if my memory serves me right.

Q It wasn't cut clear off?

A I hardly think so—if it was, it was laying up on the stump where it was cut.

Q That was some distance from Quigley's tunnel, wasn't it?

A I don't know where Quigley's tunnel is—I have never been there.

Q How did you come down from Eureka?

A From the postoffice?

Q Yes. Did you come right down Moose Creek?

A Yes.

Q You didn't cross over where Quigley lives—over near where Quigley lives?

A We took the mine road across.

Q Don't you know where Quigley lives up on the hill?

A Well, I would know the place if I see it—it was pointed out.

Q How far away were you from that on this trip?

A I was in the creek at the foot of the hill.

Q That is where that tree was?

A No, that tree was farther down where they tell

me the mouth of Friday Creek is.

Q Still farther down yet?

A I believe so.

Q About how far from Eureka Creek postoffice?

A I can't say—it was the only trip I made over there.

Q What was done with that notice that you took off that tree?

A It was put under the seat in the buckboard.

MR. ROTH: That is all.

MR. STEVENS: That is all.

WILLIAM J. CAMPBELL, one of the defendants, recalled as witness in his own behalf, being heretofore sworn, testified:

### **Direct Examination**

BY MR. ROTH:

Q Mr. Campbell, the notice of location that was delivered up on the day that your deposition was taken—was that the original notice of location that was signed by yourself and Mr. Tobin?

A Yes sir.

Q Is that the one that was recorded in the office of the Recorder of the Kantishna Precinct?

A Yes sir.

MR. ROTH: That is all.

### **Cross Examination**

BY MR. STEVENS:

Q That notice of location that Mr. Roth has just asked you about—was it signed by you, William J. Campbell?



A Yes sir, I think it was.

Q And was it signed by the defendant, Tobin?

A Well, Tobin wrote the notice and I think he signed, but I wouldn't say for sure.

Q You wouldn't say whether he signed?

A Tobin wrote it out, but I don't know whether he signed it or I did.

Q Was it written out on a printed blank form?

A Yes sir—one of the printed blanks we got from the Recorder.

Q You got it from the Recorder's office up at Eureka Creek?

A Yes sir.

Q And Mr. Tobin, in his own hand-writing wrote—that is, filled in the blank?

A Yes sir, he filled it in.

Q Did he do it with pen and ink or lead pencil?

A I don't remember—I think it was lead pencil.

Q You think it was lead pencil on a blank form. Did you have it recorded or did someone else?

A Mr. Tobin recorded it—I was there when he recorded it. It was one evening we went up there—I don't remember when it was.

Q Who got it out of the Recorder's office—you or Tobin?

A I got it out I think—am not sure.

MR. STEVENS: That is all.

MR. ROTH: That is all.

(Recess of Fifteen minutes until 3:05 P. M.)

MR. ROTH: The defendants rest.

WILLIAM F. TENEYCH, recalled as witness for

plaintiff, in rebuttal, being heretofore sworn, testified:

### **Direct Examination**

BY MR. STEVENS:

Q Mr. TenEych, do you know Mr. Quigley—J. B. Quigley?

A Yes sir.

Q Do you know about the time that Campbell and Tobin went on this ground in dispute and sunk a hole, or started a hole?

A Near the time, yes.

Q I will ask you to state whether or not, somewhere about two weeks prior to the time when defendants went on the ground, that you had a conversation with Mr. Quigley, about the vicinity of the ground, you and Quigley being present, and also your partner—a man by the name of Connolly—wherein Mr. Quigley said to you, or one of you in substance: "Why don't you fellows stake that ground?" (referring to the ground that Campbell and Tobin afterwards located) Quigley saying further that, "You fellows might just as well stake that as any one."

(Mr. Roth enters objection to the question as being irrelevant, incompetent and immaterial, the same question not being propounded to Mr. Quigley, no place stated where conversation took place, and not a conversation about which Mr. Quigley was asked—it was not stated whether or not Mr. Quigley made the statement to Mr. TenEych, the witness here, or to his partner—and not being the same question

asked Mr. Quigley. Objection over-ruled. Exception taken and allowed)

Q You may answer the question.

A Yes, a conversation of that kind took place.

Q Mr. TenEych, did you sometime in the summer or fall of 1921, either yourself or in connection with any one else, stake or locate a ledge—a lode mining claim across Moose Creek from this property in dispute, something over 3,000 ft. distant from the mouth of Quigley's tunnel?

A We had a deal with Mr. Hamilton—he staked the ground, we doing the work for an interest.

Q Did you run a tunnel of some kind?

A Yes sir, we started a tunnel.

Q What did you find there in the way of rock?

A We were not in far enough to determine whether in rock or not—had decomposed ledge matter there.

Q Decomposed ledge matter?

A Yes sir.

Q Did you find either wall?

A No sir.

Q You haven't found any wall?

A No sir.

Q What is the color of it generally?

A It is a kind of black 'talcy' looking substance.

Q Have you examined any of the vein in the Quigley lode?

A I have seen the vein—seen the lode—but I am not experienced enough in quartz mining to know whether—(interrupted)

Q State whether or not what you found in your

tunnel there across the creek—how does that compare with what you saw in Quigley's lode?

A I don't know whether it would be the same or not.

Q Does it look like the same to you?

A No sir, it does not, but it is decomposed so I don't know what it is.

Q It might be the same vein or it might not?

A It might or it might not.

Q Where you have made your location you spoke of—are there any other locations in that vicinity on that side of the creek on that hill?

A Above us, I believe Mr. Quigley has a location.

Q How far above you?

A It would be probably 2,000 feet—maybe a little more.

Q Have you examined Quigley's property?

A I have not.

Q You don't know what that is?

A No sir.

MR. STEVENS: That is all.

### **Cross Examination**

BY MR. ROTH:

Q You and Mr. Quigley were friendly at that time?

A We have been on friendly terms, yes sir.

MR. STEVENS: Which time?

MR. ROTH: The time he testified to.

Q At the time you had this talk with Mr. Quigley there, you and he were friendly?

A Yes sir.

Q Have you been ever since?

A Yes.

Q And are now?

A Yes sir.

Q I gather from what you have to say, that Mr. Quigley gave you to understand that somebody was liable to take that ground and you might as well take it as anybody?

A Yes sir.

Q He considered it open for somebody to take?

A Yes sir.

MR. ROTH: That is all.

MR. STEVENS: That is all.

O. M. GRANT recalled as witness for plaintiff, in rebuttal, being heretofore sworn testified:

### **Direct Examination**

BY MR. STEVENS:

Q Mr. Grant, Mr. O. M. Grant, you have testified heretofore in this case and have been sworn, have you not?

A Yes sir.

Q Do you know Mr. Dalton?

A Joe Dalton—yes sir.

Q You may state whether or not about the 2nd day of June 1921, at Eureka—at the mouth of Eureka—at Mr. Joe Dalton's garden, on or near the bank of Moose Creek, in the Kantishna Precinct, Alaska, you and Mr. Joe Dalton being present, that Mr. Dalton said to you in substance, that Campbell and Tobin (referring to these defendants) were setting big chunks of high-grade in one of your holes (referring



to the assessment holes that you sank in William Grant's Hillside Bench Placer Claim)—that they were getting big chunks of high-grade in one of your holes four feet deeper than you went, and that you said to Dalton in substance, "What do they (referring to defendants) want to go in my hole for?" to which Mr. Dalton responded in substance, "They did start a hole of their own this way (indicating up stream—up Moose Creek) from your hole, but the surface water was bothering them and they could not get down without timbering and they wanted to get down and locate the lode before Billy Grant got back from the Landing (referring to Roosevelt)—state whether or not you and Dalton had that conversation at that time and place in substance.

A Yes sir.

Q On or about the 9th or 10th day of November, 1920, at the cabin of Mr. Joe Dalton, during the time that you were doing assessment work on plaintiff's placer claim—did you have a conversation with Mr. Joe Dalton—no one else being present, in substance as follows—that Dalton asked you why you did not bottom one of your holes—one of the holes you put down on the bench—and pick up the Quigley lode, and that you said in substance that you suggested that to Billy Grant, the plaintiff, to put on a windlass, and that you could get your partner. Mr. Childs, or some name like that, to help you and that you could pick up that lode, and that you also then and there told Joe Dalton that Billy Grant responded to you—to your suggestion—"To hell with it, you might have to go 100 feet" and that he was not holding it for

mining purposes but was holding it for Tom Aitken for warehouse purposes.

Mr. Roth enters objection, claiming that witness has already answered that identical question, having answered "No". Objection over-ruled and Court states that question may be asked again and witness may answer. Exception taken and allowed.)

Q Do you understand the question ?

A Yes sir.

Q You may state whether or not at that time and place you and Dalton had in substance that conversation.

A No sir.

MR. STEVENS: You may take the witness.

### **Cross Examination**

BY MR. ROTH:

Q You answered that question before, didn't you?

A Yes sir.

Q That was the same question he asked you when you were on the stand before?

A About the same, I think.

Q And you answered "No" then? How do you know it was on the 2nd day of June that you had this conversation that you testified to now with Joe Dalton at or about his garden?

A I always marked it down when I planted my garden.

Q You were planting garden then?

A I was making garden ready.

Q Where were you making it ready?

A About 100 ft. from Joe Dalton's garden.

Q Then you know from that that it was on the 2nd day of June?

A I kept track of it.

Q Have you that record with you?

A No sir.

Q How many days were you working in your garden?

A I guess off and on—not all day—think I was making garden on the 1st and 2nd and on the evening of the 2nd I planted some of the spuds and on the evening of the 3rd I finished them.

Q So it was either the 1st, 2nd or 3rd?

A It was the 2nd, I tell you.

Q That was the day?

A Yes, that was the day.

Q Didn't you know they had already bed-rocked their hole?

A No sir.

Q You didn't know it?

A I didn't know it.

Q If you talked to Joe Quigley on the 2nd day of June, didn't Joe Quigley tell you they had bed-rocked the day—(interrupted)

A I didn't see Joe Quigley on the 2nd day of June.

Q I mean Joe Dalton—didn't Joe Dalton tell you when you talked to him that they had—Campbell and Tobin had bed-rocked their hole?

A No sir.

Q Do you know what work Joe Dalton was doing at the time you had this talk?

A I do—he was making an addition to his garden—making it a little wider—takng the sod off.

Q Did you know about Joe Dalton working on quartz on the other side of Moose Creek about that time?

A No sir.

Q Did you know about him working on quartz a short time before that?

A I didn't know he was working on quartz at all—he was a placer miner—I didn't know he did quartz work at all.

Q You never heard about Joe Dalton working on a quartz claim up on the other side of Jack Hamilton's claim on the opposite side of Moose Creek-

A No sir.

Q You never heard about it until the trial of this case?

A No sir.

Q Did you know about Joe Dalton having a claim adjoining the Red Top on the other end—the up hill end from this Silver King Lode?

A I know his claim is up there somewhere, but didn't know where the line was.

Q Didn't you know he was working up there all the time from the 20th day of May until after the 2nd day of June?

A No sir, I didn't know where he was—had no knowledge.

Q You testified when on the stand before that you were at the discovery shaft of Campbell and Tobin some time in June, did you not?

A Yes sir.

Q What time in June?

A On the 3rd day of June.



Q Now was it before or after that that you had this talk with Joe Dalton?

A It was the next day after I talked with Dalton.

Q At that time you knew they were to bed-rock?

A Yes sir, there was rock there from bed-rock on the dump when I got there.

Q That is the day you saw the fresh hole right close to that shaft?

A Yes sir, that same day.

MR. ROTH: That is all.

MR. STEVENS: No further examination.

ROGER PARENTEAU, recalled as witness for plaintiff, in rebuttal, being heretofore sworn, testified:

### **Direct Examination**

BY MR. STEVENS:

Q You are the same man that testified heretofore in this case?

A Yes sir.

Q I believe you testified something about the controversy that you witnessed—the portion of which you witnessed—between the defendant, Campbell, and Mr. William Grant on July 25, 1921?

A Yes.

Q That was in the morning about eight o'clock?

A Yes.

Q Did you see Mr. Campbell throwing stones at this box that contained the trespass notice of William Grant's?

(Mr. Roth enters objection to the question in rebuttal, and concedes he did so testify.)



Q Did you see Mr. Campbell—Did you see Mr. William Grant go up to somewheres near the box and notice and sit down on the ground so the box and notice would be in line between Campbell and Grant?

A No.

Q You didn't see that? Did you see Campbell go to one side so as to be out of line with Grant?

A He went out on the dump a ways, but I don't know whether he called it being out of line.

Q What did he do out on the dump?

A When I come out to help Mr. Grant out, he started towards us a ways and threw another rock.

(Mr. Roth moves to strike out answer as the matter has already been gone over in previous testimony—not rebuttal. Objection over-ruled.)

Q How near did the rock come to the box?

(Mr. Roth enters objection as irrelevant and immaterial—not rebuttal—witness testified on the matter before. Objecton over-ruled.)

Q Did that rock you saw Campbell throw come to the box?

A It must have been four or five feet from it—something like that.

Q Did it go over the top of the box?

A Yes, and a little to one side.

Q How close did it come to hitting you?

A Within two or three feet of my head.

Q And how close to hitting Grant?

A About the same.

Q Two or three feet. Do you know about how big the rock was?

(Mr. Roth objects as already being testified to.

Objection sustained.)

Q Now, if I remember your testimony, you only saw Campbell throw one rock?

A Yes.

Q And afterwards you helped Grant up from the ground?

A Yes.

Q Was Grant at the time you helped him up between Campbell and the box?

A To one side of it.

Q Which was nearer to Campbell—the box or Grant?

A They would be about the same distance.

Q And how far was Grant from the box to one side?

A Two or three feet—four feet—something like that.

Q Did you wave over to Campbell to come over where you were?

A I believe I kind of shook my fist at him.

Q You didn't wave at him?

A What would I want to wave at him for?—would sooner wave at a snake.

Q Campbell testified that you waved for him to come over where you were—you and Grant—as I understand you, you did not do that?

A No.

MR. STEVENS: You may take the witness.

**Cross Examination**

BY MR. ROTH:

Q How did you shake your fist?—like that? (indicating)

A Yes sir.

Q And after you did that, Grant started over to you—I mean Campbell started over towards you?

A Yes.

Q Weren't you looking for trouble that morning?

A I was not.

Q Didn't you load that gun?

A I did not.

Q Didn't you so state over there at the little farcical trial they had?

A I did not.

Q Did you have anything to do with that gun before Grant took it and went out with it?

(Mr. Stevens enters objection as not proper cross-examination. Objection over-ruled. Exception taken and allowed.)

A No, I did not.

Q Where was that gun?

A When we went to eat breakfast it was under the mattress of Grant's bed—rolled the mattress back to make a seat to sit at the table and that was the first I saw of the gun.

Q What did you do with the gun?

A Who?

Q You.

A I didn't put my hand on it at all.

MR. ROTH: That is all.

MR. STEVENS: That is all.

ALOIS FRIEDRICH, recalled as witness by plaintiff, in rebuttal, being heretofore sworn, testified:

**Direct Examination**

BY MR. STEVENS:

Q You are the same Mr. Friedrich that testified heretofore in this case?

A Yes sir.

Q Mr. Friedrich, you have indicated on map marked "Plaintiff's Exhibit A" at the lower end line of the Red Top Lode Claim of Quigley's—from the lower corner stakes of Quigley's there are two red lines running up hill in a northeasterly direction, crossing the lines of the Hillside Bench Claim as originally—well, crossing the upper side line of the Hillside Bench between—on the line between the corner that is designated on the map as corner No. 3 post and corner No. 4 post. Have you calculated the area of that section—the area of that part of Quigley's Red Top Lode?

A I have.

Q And what is the area?

(Mr. Roth enters objection as being irrelevant, incompetent and immaterial. Objection over-ruled. Exception taken and allowed.)

A 3.7 acres.

Q Have you calculated that part of the lower end of Quigley's location between Quigley's lower end line, as indicated on this map, and the ground where the line between post—corner post No. 3 and corner No. 5—is located?

A I have.

Q Where that line cuts or intersects Quigley's side line?

A I have.

Q What is that area?

(Mr. Roth enters objection as being irrelevant, incompetent and immaterial. Objection over-ruled. Exception taken and allowed.)

Q What is that?

A 2.3 acres.

MR. STEVENS: You may cross examine.

MR. ROTH: No questions.

(Recess of ten minutes at request of counsel until 4:20 P. M.)

JOHN BUSIA, recalled as witness by plaintiff, in rebuttal, being heretofore sworn, testified:

### **Direct Examination**

BY MR. STEVENS:

Q Your name is John Busia?

A Yes.

Q You are the same man who testified heretofore?

A Yes.

Q I will ask you to state whether or not about February 1st, 1921, at Tom Aitken's bunkhouse in the evening after supper, when William Grant was present, O. M. Grant, John Busia, and others of the crew of Tom Aitken being present, did the following conversation take place—and Mr. Campbell also being present—the defendant—where in Campbell said that Quigley had started his new tunnel, and William Grant then asked Campbell where he (Quigley) had



started it, and Campbell said about forty or fifty feet below the blacksmith shop, and William Grant said that Quigley was way down over his line, and Campbell said, "No, his stake is down another 100 feet" and William Campbell said "No" and—I mean William Grant said "No", and he also then said to O. M. Grant that Quigley must be down with his blacksmith shop over 100 feet below Grant's line, and O. M. Grant said that the stake he put up is in the draw and you can't see it from the corner, but the shop must be something like that, and Campbell said that Quigley's lower center stake was just above where O. M. Grant was working, and William Grant then said that he did not care where his lower stake is—that he knew where his line is, and William Grant also said that Quigley could just as well have turned in that dead work for assessment work on the placer and saved Aitken \$100.00, and William Grant said that it was more for Quigley's benefit to hold the Hill Bench for a mill site than it was for Aitken's benefit. Did you or did you not, hear a conversation at that time and place in substance as I have stated and is contained in this question?

A I heard him—Mr. Campbell came up one day and said Quigley had started some hole, but I don't know whether Tom Aitken was there in the house—(interrupted)

Q This conversation I have been asking about was a conversation that Mr. Campbell testified took place on or about the 1st of February, 1921, at Aitken's bunkhouse in the evening after supper, William Grant, O. M. Grant, and you, and other members of

Aitken's crew being present, and also Campbell—it doesn't say Aitken was present—but at this time and place, did you hear a conversation like that?

A No, not at all.

MR. STEVENS: That is all.

### Cross Examination

BY MR. ROTH:

Q You did hear a conversation there though?

A I just heard when Campbell was talking to William Grant that Quigley started a hole and Grant wanted to know the place he sank—but I don't remember—was on the other side of bunkhouse and don't understand—

Q You didn't pay much attention?

A No.

Q You don't know really what was said?

A Know they was talking about sinking a hole—Quigley was sinking a hole—but I don't know.

Q Did Billy Grant kick about it at the time?

A He never kicked—looked to me kind of sore, but never kicked.

Q You were talking with somebody else at the time, and didn't pay much attention to this conversation?

A No.

Q Who was paying attention?

A I don't know.

Q Did you hear Billy Grant say in that conversation anything at all about Quigley working on that ground?

A He never tell me.

Q Did you hear him say anything to Campbell or anybody there at that time?

A I don't remember.

MR. ROTH: That is all.

MR. STEVENS: That is all.

WILLIAM GRANT, plaintiff, recalled as witness in his own behalf, in rebuttal, being heretofore sworn, testified:

### **Direct Examination**

BY MR. STEVENS:

Q Mr. Grant, I will ask you whether or not, about February 1st, 1921, at Aitken's bunkhouse in the evening after supper, you being present, and O. M. Grant and John Busia and others of the crew of Tom Aitken being present, the following conversation took place in substance: that Campbell said that Quigley had started his new tunnel and you asked Campbell where he had started it, and Campbell said about forty or fifty feet below the blacksmith shop, and you (William Grant) said that Quigley was away down over your line, and Campbell said "No", his stake is down another 100 feet or more, and you said, "No" and then said to O. M. Grant that Quigley must be down with his blacksmith shop over 100 feet below your line, and O. M. Grant said that the stake he put up is in the draw and you can't see it from the other corner, but that the shop must be something like that, and Campbell said that Quigley's lower center stake was just above where O. M. Grant was working and you then said "I don't care where his lower stake is, I know where my line is" and you also said that

Quigley could just as well have turned in the dead work for assessment work on the placer and saved Aitken \$100.00, and you said that it was more for Quigley's benefit to hold the Hill Bench for a mill site than it was for Aitken's benefit?

(Mr. Roth enters objection on the ground of being immaterial and same question already answered by witness when on the stand before. Objection overruled.)

Q You may state whether or not at that time and place substantially that conversation occurred.

(Mr. Roth again objects to question as having been put to this witness before. Court rules that if there is any doubt, witness may answer again. Exception taken and allowed.)

Q State whether or not that conversation in substance occurred at the time and place indicated by the question.

A No sir, not to my knowledge—no such conversation or anything like it.

Q It never occurred?

A No sir.

Q Did you on the morning of the 25th of July, 1921, after nailing up the box on the stake which contained trespass notice that you put there on your placer claim, as you have heretofore testified—did you see Mr. Campbell throwing small stones or pebbles at that box and that you thereupon went over there, sitting down on the ground so the box—so you would be in line with Campbell and the box—so the box would be between you and Campbell?

(Mr. Roth enters objection as immaterial irrel-



evant and incompetent. Objection over-ruled.)

Q Did that occur?

A No sir.

Q When Mr. Campbell brought back the cayoses, or horses, to Roosevelt, about the 10th or 11th of May—whenever it was—after having borrowed them, did you say to Mr. Campbell that you never saw those horses in better condition?

A No sir.

Q You didn't say that?

A No sir.

Q Did you ever state to Campbell, the defendant, that if Quigley would turn in the work he did as assessment work for your placer claim, it would save Aitken \$100.00?

A No sir.

Q At Roosevelt did you have a conversation with the defendant Campbell along in the fore part of May 1921 wherein you asked Mr. Campbell what Quigley was doing and Campbell told you something about what he was doing and you said that Quigley ought to let Aitken take out what he had found there? Did you say that?

A No sir.

Q When Mr. Campbell brought the horses back to Roosevelt, after having borrowed them about June 16, 1921—(question withdrawn)—When Mr. Tobin went to Roosevelt, did he and you have a conversation about June 16, 1921, in the presence of 'Cow' Miller, or any other person, where you asked—stated or told him you heard that he—you understood that he, or he and Campbell had struck it rich, and that you un-



derstood that they had sunk in one of your holes, and that Tobin said "No, not in your hole"? Did such a conversation occur between you and Tobin?

A Not in them words—no.

Q In substance, was there such a conversation at Roosevelt on June 16, 1921?

A Yes sir.

Q There was a conversation?

A He wanted to know if I wanted to sell the horses and I told him "No."

Q He wanted to buy the horses? and you told him "No"?

A Yes.

Q Was that all there was to it?

A Yes.

Q You didn't say anything about him striking it rich in your hole?

A No sir.

Q Never mentioned it at all?

A No sir.

Q About July 3, 1921, down on the lower end of where the Silver King Lode Claim has been located, did you tell Tobin to keep off your Hillside Bench Claim and you and Tobin had a few words?

A I told him—but not that day.

Q What date did you tell him?

A A few days before that.

Q About how many?

A Two or three days before that.

Q Along about the first of July?

A About the first of July.

Q Did you have a conversation with Mr. Quigley,

Joseph Quigley, where 'Big Sandy' Burr was present, in August or September, 1920, while Quigley was working on his Red Top Lode Claim—did you ask Quigley something about the—his work there—and that Quigley said he dug up a nice prospect, and he said in substance he wanted a building site, and you said to Quigley that he could have it if he would turn in the work he had done as assessment work on your placer claim—or words to that effect?

(Mr. Roth enters objection as same question was answered by this witness before. Court rules that on account of so many conversations being testified to it is difficult to remember who has been questioned with reference to them, and instructs witness to answer..)

Q Was that conversation had in substance in August or September, 1920, between you and Quigley?

A No sir.

Q You may state whether or not, some time before O. M. Grant did the assessment work on your Hillside Bench Claim— whether or not you had a conversation with Mr. Quigley where Quigley said to you that if you would give him a bill of sale to this ground, the Hillside Placer Bench, that he would keep up the assessment work, and that you said that you could not do it as you had located it for Aitken and that he (Quigley) would have to see Aitken about it? Did you and Quigley have a conversation like that where you said in substance what I have asked you?

(Mr. Roth enters objection, the same question

having been asked of this witness before. Objection over-ruled.)

A Part of the question "Yes", and part "No".

Q Did Quigley ask you for a bill of sale of the property?

A Yes sir.

Q And what did you say?

A I told him, No, I wouldn't do that.

Q Did you tell Quigley in substance that you had located the ground for Aitken and he would have to see Aitken?

A No sir.

Q Did you ever tell Quigley that?

A No sir.

Q Did you ever tell anybody that?

A I never told nobody.

Q Did you have a conversation with Mr. Quigley about August or September, 1921, wherein Mr. Quigley asked you for—wanted to get you to give him rights to dump on your claim, and you stated to him you could not do so until you had seen Mr. Stevens? Did that conversation occur?

A Yes sir.

Q Was it just that way or how was it?

A The conversation wasn't in them words.

Q State as near as you can what the conversation was.

A I said I couldn't do it—had a partner in it.

Q Was that before or after this suit was brought?

A After the suit was brought.

Q Did you mention my name?

A I don't think I mentioned it at all, but wouldn't swear to it.

Q Did you have a partner at that time?

A Only the arrangements made with my attorney

Q You had me in mind when you said you would have to see your partner?

A Yes.

Q As a matter of fact, you and I were not partners at that time?

A That is the way I put it.

Q We were not partners at that time?

A In one sense of the word, but not partners—but we had an agreement at that time.

Q The only relation we had at that time was the relation of attorney and client?

A Yes sir.

Q And isn't it true, as compensation for my services in this case you have agreed to give me an interest in this ground if I win it, and if I don't win it, of course, I won't get any pay?

A That is it.

Q And you are to pay the costs of court, isn't that true?

A Yes sir.

Q And it was that relation you had in mind when you had me in mind as partner—isn't that true?

A Yes sir.

Q It is in the evidence here that you located this placer claim and also the quartz claim in your name. Have you ever made a deed or transfer to any one of this placer claim, or any interest in it?

A No sir.

Q Have you made a deed or any conveyance of your Hillside Quartz Lode Claim that you located there to any one?

A No sir.

Q Have you ever made any papers or given any rights there, except other than what you have testified to that you gave your attorney Stevens—have you ever made any disposition of any part of either of those claims, excepting as you have indicated in your testimony?

A No sir.

Q That is all now, Mr. Grant. Is there anything else now that you think of at this time that I ought to ask you about that I haven't?

A No sir.

MR. STEVENS: You may take the witness.

### **Cross Examination**

BY MR. ROTH:

Q You say you told Mr. Tobin about the 1st of July to keep off that ground?

A Something about that time, yes.

Q About the 1st of July you told Mr. Stevens?

A Yes sir.

Q How long did it take you to go from Eureka Creek postoffice to Roosevelt on that particular trip that you were with Moody—the first trip Moody was there?

A I believe I was in Roosevelt the night of the 3rd. That is always a five days trip and sometimes longer.

Q How long did it take you to go from Eureka



to Roosevelt?

A On that particular trip?

Q Yes.

A I don't exactly remember.

Q Did you make it in one day?

A No.

Q Where did you stay the first night?

A Stayed at Bear Creek.

Q Did you make it into Roosevelt the next day?

A Yes sir.

Q What time of day of the second day did you get to Roosevelt?

(Mr. Stevens objects to question as not proper cross examination. Objection over-ruled.)

Q Where were you on the 4th day of July?

A I believe at Roosevelt.

Q How long on that trip just before did you stay in Eureka—I mean at Eureka?

A On that trip?

Q Yes.

A I don't remember—I don't know what trip you mean—I am mixed up.

Q Mr. Moody only went in one time?

A That is all.

Q I want to fix this time as nearly as I can—Mr. Moody went with you only one trip to Eureka—that is the time I am talking about—don't get mixed up on the trip—the one in which Mr. Moody went with you from Eureka and returned to Roosevelt—you won't get mixed up on which trip, will you?

A Not when you say on that one.

Q On that trip when you started with Mr. Moody

—how long did it take you to go from Roosevelt to Eureka?

A I don't remember—we stopped twice—at Bartlett's camp and Bear.

Q How long did it take to make the trip in?

A I don't remember.

Q And you don't remember how long you stayed at Eureka?

A With the mail?

Q Yes.

A Stayed twenty-four hours with the mail.

Q And then after twenty-four hours you went back with the mail?

A Yes.

Q And you were parts of two days going back?

A Over two days going back—can't make it in two days—it takes five or six days to make the round trip and sometimes it takes ten.

Q On that trip going from Roosevelt with Mr. Moody is the time you had quite a lot of passengers?

A No, I had Mr. Moody, Mr. Felix and another man.

Q No, I am talking about going from Roosevelt to Eureka.

A Yes, I had a lot of passengers then.

Q Who were the passengers?

A I don't remember—I really didn't have any passengers, they come along with me—I didn't charge them.

Q Who come with you that time?

A I don't remember on that time who came with me that time.

Q Do you remember when George Black came up to Roosevelt?

A No, I don't.

Q You don't remember when he got there with the steamboat?

A No sir.

Q When John Biglow went in there from Roosevelt, he went with you didn't he?

A I think so, but I wouldn't swear to that.

Q You did swear before.

A If I did, then I thought I knew he went in with me.

Q You introduced him to Joe Dalton, didn't you?

A Yes sir.

Q The time you introduced him to Joe Dalton, he went in with you?

A He must have.

Q Then he did go in with you? At the time he went in with you, isn't it true that nobody else went in with you except John Biglow and the driver—Clark?

A I don't know if it was that trip or not.

Q You testified before it was that trip, didn't you?

A I didn't testify that Clark was driver, did I? I never come out with Clark driving—drove the cay-oooses myself.

Q When you brought John Biglow up to Quigley's you left the wagon in the road and walked up to Quigley's place, isn't that true?

A It may be true.

Q It had to be true.

A It didn't have to be true.

Q Why not? You didn't drive up when you introduced John Biglow to Joe Dalton—you didn't have the wagon along with you then, did you?

A No—not up the hill—what date was it?

Q That is what I am trying to get at—that is the very thing I am trying to get at.

A You are trying to mix me up—if you are right, I made two trips in succession and partly covered the same ground in two different trips.

Q But you testified very positively you only made one trip and I am trying to show you that you made two trips—that the first trip you came over with Biglow—you and Biglow and Clark came over together and went right back and met Moody with the mail and came right back to Eureka, now isn't that true?

A I wouldn't swear it is true—I always thought Biglow came out with us that time we came out—  
(interrupted)

Q Isn't that correct?

A I wouldn't swear it was correct—I don't know.

Q Would you swear it isn't correct?

A I would not—I can't do it either way—am not sure.

Q Isn't it true that you came up there at the time Biglow came, which was on the 23rd day of June—that you left Roosevelt immediately after George Black got in with the steamboat upon which John Biglow came to Roosevelt, and that you left immediately on the 21st of June and that you went right on and got in Eureka on the 22nd or 23rd of



June, and that you went right back and met Moody and got the mail and then come in and arrived in there about July 1st?

A That is utterly impossible—couldn't get over the road in less than three or four days.

Q I said the 23rd—21st, 22nd or 23rd—say it was the 23rd or 24th—I am not trying to show that you made a quick trip or slow trip, but am simply talking about the trip itself. Isn't it true that you made that trip in there and went back without putting up any notice of trespass, or without notifying either one of the defendants to get off this ground?

A They weren't on it—couldn't notify them to get off there when they weren't on it—that is, if I was there—I can't swear to that.

Q When Mr. Tobin was over to your place on the 16th day of June at Roosevelt where you were loading ore, the only thing talked about at all was he asked you if he could buy those horses and you told him "No"—that is all? There wasn't one word said at all about the claim or his work on that placer ground of yours?

A It was all at that time—it was only hearsay that they were on there—Jack Hamilton told me they were in my hole.

Q When he was there you didn't say one word to him about it?

MR STEVENS: This was 10 days after Campbell and Tobin's location had been made and couldn't have any effect whether he notified him or not.

A I notified them by registered letter first.

Q That was dated on the 3rd day of July, 1921?



A I don't know the date—don't remember.

Q It was on the trip that you were in there with Moody, wasn't it?

A That I registered the letter?

Q Yes.

A I posted the notices.

Q That is the time you gave them registered letter notice?

A No sir. The trip that I came in with Moody, Mr. Clark and I went up and posted notices—when I went over with the mail—I went back and started down and found this notice posted up on the road and then when I come back I notified them by registered letter.

Q It was later that you gave them notice by registered mail?

A Yes, after notice was torn down.

MR. ROTH: That is all.

### **Re-Direct Examination**

BY MR. STEVENS:

Q Do you know the date you mailed registered letters to those men?

A No sir, I don't.

Q Have you copies of those letters?

A No sir.

Q I hand you a Post Office register return receipt (hands card to witness) —it seems to be stamped "Kantishna, July 23rd, 1921". Do you know whether that refers to the letter you spoke of?

A Yes sir.

Q It was addressed to whom?

A One to Mr. Campbell and one to Mr. Tobin.

Q Here is another one—same date (hands card to witness) does that also relate to the other letter you addressed to Mr. Tobin?

A Yes sir.

Q It bears date of July 23, 1921, does it?

A Yes sir.

Q Since referring to that, are you able to state whether or not you posted that letter at the post-office about the time stamp indicates—July 23, 1921?

A Yes, Mr. Wilson gave me these.

Q When you delivered him the letter?

A Yes sir.

MR. STEVENS: We offer these in evidence.

(Admitted and marked Plaintiff's Exhibits "H" and "I".)

MR. STEVENS: It is stipulated that these two exhibits are both dated July 23, 1921 by stamp and stamped "Kantishna, Alaska." The return receipt of one is signed by W. J. Campbell and the other signed J. L. Tobin, by W. J. Campbell. Do you stipulate you consider them read? (addressing Mr. Roth.)

(Mr. Roth so stipulates and it is agreed that it is not necessary to read them to the jury.)

MR. STEVENS: That is all.

MR. ROTH: That is all.

MR. STEVENS: Rebuttal closed.

WILLIAM J. CAMPBELL, one of the defendants, re-called as witness in his own behalf in sur-rebuttal, being heretofore sworn, testified:

**Direct Examination**

BY MR. ROTH:

Q At the time that Mr. William Grant and Mr. John Biglow came up there at the time that Mr. William Grant introduced John Biglow to Joseph Dalton, did you see the wagon that they came in?

A I saw the wagon going up Moose Creek, but I didn't see them get out.

Q Who was in the wagon?

A Joe Clark.

Q Any one else?

A Not at that time.

Q Do you know when Mace Farrar and Dr. Layman and those people mentioned came in with reference to the time John Biglow came in?

(Mr. Stevens enters objection on the ground of not being proper sur-rebuttal. Objection overruled)

A Yes sir.

Q When?

A About the 1st of July.

Q And when was this that John Biglow and William Grant came in?

A About the 23rd of June.

MR. ROTH: That is all.

MR. STEVENS: That is all.

(Both sides rest.)

Session 10:00 A. M. February 9, 1922.

MR. ROTH: If the Court please, defendants desire to renew their motion for non-suit upon all the grounds stated at the prior time of presenting the motion.

(Court denies motion. Exception taken and allowed)

## TESTIMONY CLOSED

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(Title of Court and Cause.)

### Instructions to the jury

Gentlemen of the Jury:-

#### I.

You are instructed that the case now on trial before you is what is known as a civil case, and generally called an action in ejectment, for the recovery of possession of real property.

In this action the plaintiff claims that he is the owner and entitled to the possession of what is known as the Hillside Bench Placer Claim, by virtue of a location thereof, made by him in the month of April 1920, containing twenty (20) acres more or less, being opposite to, adjoining and lying east of the Horseshoe Placer Mining Claim on the right limit of Moose Creek, being thirteen hundred and twenty (1320) feet in length, by six hundred and sixty (660) feet in width, in the Kantishna Mining and Recording District, Alaska.

He also claims that he is the owner and entitled to the possession of what is known as the Hillside Lode



Claim by virtue of a location thereof, made by him on the 25th day of July, 1921, the center upper end post of said Hillside Lode Claim being within the boundaries of the above described placer claim and situated about eighty (80) feet down hill and in a westerly direction from the mouth of what is known as the Quigley tunnel, said post being the discovery post on which the notice of location of said claim is posted; thence running in a westerly direction and down hill along the vein, through said Hill Bench and Horseshoe placer claims, a distance of fifteen hundred (1500) feet to the center lower end line of said quartz claim, the side lines of said Hillside Lode Claim running parallel to said lode and twenty five (25) feet on either side of the center of the vein, all in said Kantishna Mining and Recording District, Alaska.

While the title of the action attempts to designate four persons as defendants in the case, in reality, there are only two, namely: William J. Campbell and J. L. Tobin, and they, in answer to the contention of the plaintiff, deny his right and claim of title, and deny his claimed right of possession to either the aforesaid Hillside Placer Claim or to the aforesaid Hillside Lode Claim and to both of them, and for themselves claim and assert their title to and right of possession by virtue of a location thereof, made on the sixth day of June, 1921, of what is known as the Silver King Lode Mining Claim, situated on the right limit of Moose Creek and on the left limit of Friday Creek, in the Kantishna Mining and Recording District, Alaska, as the same is described in recorded notice thereof, in the records of said Record-



ing District, recorded in Volume 1 of "General" at Page 207 and numbered 3147.

The plaintiff in his reply filed in the pleadings denies the facts set up by the defendants in their further separate and affirmative defense, and denies their title and right of possession to the Silver King Mining Lode, but admits that the defendants were in possession of the same at the time of the commencement of this action.

I—a.

You are further instructed that while the plaintiff claims damages in the sum of \$500.00, no competent evidence has been placed before you upon the subject of damages, and you should eliminate and not consider the question of damages in your deliberations and verdict.

II.

You are instructed that in the trial of a civil action, the Jury and Judge of the Court have separate and distinct functions to perform. It is the duty of the Jury to hear all the evidence in the case, and to decide, subject to the instruction of the Court, all questions of fact arising therefrom. It is the duty of the Judge of the Court to decide all questions of law arising from the evidence, and to instruct you upon the law applicable to the facts and evidence in the case, and the law makes it your duty to accept as law what is laid down as such in these instructions.

III.

You are instructed that the issues of fact in this case as between plaintiff and defendant, that is to say,

what one alleges or affirms and the other denies, must be decided and determined by you, and be so determined by you according to the preponderance of the evidence in favor of the one or the other. By preponderance of the evidence is meant the greater weight of the evidence when considered in connection with all the facts in evidence in both sides, and the instructions of the Court as to the rules of evidence applicable to the facts in issue.

#### IV.

In this connection you are instructed you are the sole judges of all questions of fact and of the credibility of all witnesses appearing before you, and of the weight and effect of the testimony and evidence; but your power in this respect is not arbitrary, but is to be exercised by you in subordination to the rules of evidence laid down in these instructions.

#### V.

The burden of proof is upon the plaintiff as to all matters of fact claimed by him affirmatively, and equally so upon the defendants as to all matters of fact affirmatively claimed by them and as between the parties, plaintiff and defendants, if you should find the evidence evenly balanced, or if the weight of the evidence is on the side of the defendants, you should then find for the defendants; otherwise, you should find for the plaintiff, if the evidence preponderates in his favor.

#### VI

The weight of the evidence is not necessarily determined by the greater number of witnesses produc-

ed on one side or the other, and in considering the evidence, you are not bound to find a verdict in conformity with the declarations of testimony of any number of witnesses, when their evidence does not produce conviction in your mind, against a lesser number of witnesses or other evidence satisfying to your mind. Where the evidence is contradictory, the finding shall be according to the preponderance of evidence. Evidence is to be weighed and estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, and therefore if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

## VII

In determining the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against any of the parties to the case; the probability or improbability of such witness' statements; the opportunity he had to observe and to be informed as to matters respecting which he gave testimony before you; and the inclination he evinced, in your judgment, to speak the truth, or otherwise, as to matters within the knowledge of such witness. It is your duty to give to the testimony of each and all

of the witnesses appearing before you, such credit as you consider the same justly entitled to receive.

### VIII

If you find that any witness has wilfully testified falsely in one part of his testimony in this case, you may distrust any part or all, of the testimony of such witness. And, if you believe from the evidence that any witness appearing before you in this case has wilfully testified falsely, you are at liberty to reject the entire testimony of such witness; but you are not bound to reject the entire testimony of a witness because he has testified falsely in some part of his testimony; you should reject the false part, and may give to the other parts such weight as you may deem they are justly entitled to receive.

You should not fail to weigh and consider fairly and give proper weight to all testimony that you consider truthful, and not false.

### 9

There is some evidence in this case as to oral admissions of some of the parties to this action, and oral statements of some of the witnesses in the case, to persons who have appeared before you as witnesses and testified to the same. I charge you that, owing to the infirmity of the human mind and the inability of witnesses to repeat the exact language used by persons alleged to have made such oral admissions, and to understand it correctly and repeat it with all of its intended meaning, you are to view the evidence as to such oral admissions and statements with caution. But if you shall find and believe that such oral ad-



missions were actually made by the person or persons alleged to have made them, you should consider them as candidly and fairly as other evidence in the case and give them weight accordingly.

10

You are instructed that a witness may be impeached either by proof of contradictory statements or statements materially different and at variance with what he may have testified to upon the witness stand. And, if you believe that any witness in this case has been successfully impeached, you may disregard the testimony of such witness unless his testimony is corroborated by other credible evidence in the case, and it is for you to say whether or not you will believe the witness sought to be impeached, or the witness brought to impeach him, as the law makes it incumbent upon the jury to determine the credibility of all the witnesses appearing and testifying before them in the trial of the case.

11.

You are also instructed that if you believe any witness has been successfully impeached or contradicted, in regard to any matter or thing material to the issues in this case, as defined in these instructions, you will be justified in disregarding the entire testimony of such witness, except in so far as his testimony may be corroborated by other credible evidence in the case, by facts and circumstances proven on the trial.



## 12.

You are instructed that the respective plats introduced in evidence in this case are not to be considered by you as evidence of themselves, but only to the extent that the posts, points, distances, buildings, corners, holes, lines, angles and all printed or written matter of every description thereon, are sustained by a preponderance of all the evidence in said cause, and in so far as these things are not so sustained by the preponderance of the whole evidence, you should reject them. Their main purpose is to illustrate and explain the testimony of the various witnesses who testified concerning them, and to give to the jury a clearer understanding of the matters in controversy herein in making up your verdict, you should be governed solely by the evidence in the case as it comes from the lips of the witnesses.

## 13.

You are instructed that Section 2319 of Chapter 6, Title 32, Revised Statutes of the United States, provides as follows:-

“All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and that

Section 2322 provides as follows:-

“The locators of all mining locations on any min-

eral vein, lode, or ledge, situated on the public domain shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location”

and that by Section 2329, it is provided that,

“Claims usually called placers, including all forms of deposits, excepting veins of quartz or other rock in place shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings, as are provided for vein or lode claims”

14.

You are instructed that in order to make a valid location of a placer mining claim under the provisions of the statutes of the United States and Alaska, it is necessary that the locator shall be a citizen of the United States, or have declared his intention to be such, and

1st. That the ground be open unappropriated, public domain, or public mineral lands of the United States.

2nd. That a discovery of gold, or other precious metals, be made by the locator, on or in the ground, either upon or beneath the surface thereof, and within the boundaries of the placer location; that the discovery should be such as would justify a person of ordinary prudence, not necessarily a skilled miner, in the further expenditure of his time or means in an effort to develop a paying mine, taking into consideration the character of the ground sought to be located, its location and surroundings with reference to the existence of other mines or discoveries if any, in the same vicinity.

3rd. The placer ground sought to be located must be marked distinctly on the ground so that its boundaries can be readily traced. At each corner or angle of such claim a substantial stake, post or other monument shall be placed, and if the same is a stake or tree it must be not less than three feet in height above the ground, and not less than three inches in diameter, hewed on four sides. Such stakes or posts shall be marked with the name or number of the claim and the number of the corner or angle. The initial stake or post shall be one of the corner stakes. The locator shall post or write upon such initial post or stake a notice of location, which shall contain: (a) the name or number of the claim; (b) the name of the locator; (c) the date of discovery and of posting notices on the claim; (d) the number of feet in length and width of the claim.

4th. The statutes of Alaska require that, within ninety days after such location, the locator shall record, with the recorder of the district where such claim is located, a certificate of location, which certificate shall contain the name or number of the claim, the name of the locator, date of discovery and of posting location notice, the number of feet in length and width of the claim, a description with reference to some natural object, or permanent monument, or well known mining claim, and a description of the boundaries so far as applied to the numbering of stakes or monuments.

And you are instructed further, that a failure on the part of the plaintiff to make such a discovery as the law given in these instructions, declares to be

necessary, or a failure on his part to comply with the markings of said claim or the posting of the notice of location on the initial stake or post or in the recording of such certificate of location, then such location was and is null and void, and the ground covered by the same remained as part of the public domain and was open for relocation by any qualified locator.

15,

The plaintiff claims a verdict at your hands upon two grounds:

1. That he made a prior valid location of what is known in the testimony as the Hillside Bench Claim long prior to the entry of defendants thereon, and that prior to their entry, the lode which they claim to have located was an unknown lode.

2. That he himself made a valid lode location of the said lode on July 25, 1921, at which time it was then a known lode.

The jury are further instructed that, in order for the plaintiff to establish his right to the possession of the ground included in his location of what is called by him the Hillside Bench Placer Claim, upon the basis of his prior location and ownership of said placer claim, it is incumbent upon the plaintiff to prove substantially,

- 1st. That he made such a discovery of gold or other mineral upon the placer mining claim described in his complaint as would warrant a man of ordinary prudence, not necessarily a miner, in spending further time and means on said claim with a reasonable hope of developing a paying placer mine, taking all of the natural conditions into consideration.



2nd. That he wrote or posted upon the initial post or stake of the placer claim described in his complaint, a notice of location containing (a) the name or number of the claim; (b) the name of the locator; (c) the date of discovery and of posting notice on the claim; (d) the number of feet in length and width of the claim.

3rd. That he marked the location of the placer claim described in his complaint, on the ground, so that its boundaries could be readily traced, by placing at each corner or angle thereof substantial stakes or posts, not less than three feet high upon the ground and not less than three inches in diameter, hewed on four sides, and the stakes or posts so used must each be marked with the name or number of the claim, and the designation by number of the corner or angle.

4th. That, within ninety days after the discovery and posting of the notice of location, he recorded with the recorder of the Kantishna district, a certificate of location which contained; (a) the name or number of the claim; (b) the name of the locator or locators; (c) the date of discovery and of posting of the location notice; (d) the number of feet in length and width of claim; (e) a description with reference to some natural object permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the number of the stakes or monuments.

5th. That he performed the annual assessment work upon said Hillside Bench Placer Claim to an extent of not less than \$100.00 for the year 1920, prior



to July 1, 1921.

And you are instructed further, that a failure on the part of the plaintiff to make such a discovery as law, given in these instructions, declares to be necessary, or a failure on his part to comply with the markings of said claim or the posting of the notice of location on the initial stake or post, or in the recording of such certificate of location, then such location was and is null and void, and the ground covered by the same remained as part of the public domain, and was open for relocation by any qualified locator.

16.

The jury are hereby instructed that in order that the plaintiff should recover, if at all, he must recover on the strength of his own title and not upon the weakness of the title of defendants.

17.

The jury are further instructed that the burden is upon the plaintiff to prove a prior valid placer location of the Hill Bench Placer claim, or a valid prior quartz location of the Hillside Lode Claim, as described in his complaint, and if the plaintiff has failed to prove any of the acts or things made essential by Acts of Congress or by Acts of the Territorial Legislature now in force, with reference to the acts necessary to make a prior valid location of such placer or quartz mining claim, then your verdict should be for the defendants, as the defendants are not required to introduce any evidence until the plaintiff has first proved the making by him of a prior valid placer or quartz mining location, as set forth in

his complaint.

## 18.

You are further instructed that, when a placer location has been completed, it becomes property in the highest sense of the term, and is equivalent to a grant from the government, subject only to the condition imposed of performing annual labor thereon until patent is applied for, and the owner of such valid placer location is entitled to the exclusive possession thereof and to everything underneath, including any unknown lode or lodes, but he acquires no title or right of possession to any known lode or lodes.

## 19.

You are instructed that defendants herein claim that:

1st. Plaintiff Grant did not make a valid placer location of what is known in the testimony as the Hillside Bench Claim, and that the same was and is void, and that even if said placer claim was valid and not void, that the lode or vein upon which they located the Silver King Lode Claim was, at the time of entry of defendants upon what is known in the evidence as the Hillside Bench Placer Claim, a known lode.

2nd. That defendants made a valid location of the Silver King Lode Claim prior to plaintiff.

You are also instructed that in order to make a valid location of a quartz claim under the provisions of the laws of the United States and Alaska, it is necessary that the locator shall be a citizen of the United States, or shall have declared his intention to be such, and

1st. That such location be made upon a vein, lode or ledge of rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable mineral deposit, which is subject to entry and patent as a lode claim under the mining laws of the United States.

2nd. That the said lode be discovered by the locator upon, open unappropriated public domain, or public mineral lands of the United States.

3rd. That said discovery of rock in place containing gold, or other precious minerals as above enumerated, be made by the locator within the boundaries of his mining claim, as claimed; that said discovery be such as would justify a person of ordinary prudence, not necessarily a skilled miner, in the further expenditure of his time or means in an effort to develop a paying lode mine, taking into consideration the character of the ground sought to be located, its location and surroundings with reference to the existence of other lode mines or discoveries, if any in the same vicinity.

4th. That in making the location of said lode claim, the locator post a notice of location upon the claim, containing the name of the lode or claim, the name of the locator or locators, and the number of linear feet claimed in length along the center line of the claim, each way from the point of discovery, with the width on each side of center line of the claim at the surface, and the general course of the vein or lode as near as can be determined.

5th. That the locator mark upon the ground the boundaries of his location as claimed, so that the same can be readily traced, and the discovery upon

which the location is based must be at the time of location defined upon the ground by the removal of so much of the surface material as may be necessary clearly to expose to view the discovery claimed, and in such manner as to perpetuate its identity; and preserve it, so far as practicable, from obliteration; also its locus must be witnessed by erecting a substantial monument or post, bearing the notice of location as near the discovery as practicable.

That the boundaries of the claim as marked upon the ground consist of no less than the following: The erection at each corner of the claim, and at each angle in the side lines if such there be, of a substantial monument or stake, or the blazing of a tree, at least three inches in diameter, each of which shall bear the initial of the lode or claim and a designation as to the point upon the boundaries of the claim which the said monument represents. The center line and both end lines shall be marked by blazing trees or cutting brush, or the erection of line monuments, as the nature of the country requires so that the lines of the location may be readily traced upon the ground. Where the true point for a corner or angle corner is for any reason inaccessible or the erection of a monument thereat is impracticable, a witness monument may be erected as near the true point as practicable, which witness monument must be so marked as to indicate with reference thereto, the position of the true point for the corner or angle point. Such witness corner or monument shall not be of lesser size than is prescribed for other corners. The completion of the marking of the boundaries of the claim upon the



ground shall follow the posting of the notice of location within a reasonable time, not to exceed thirty (30) days.

7th. That the locator, within ninety (90) days of the posting of the location notice upon the claim, record a certificate of location with the Recorder of the District within which the claim is located. Such certificate must contain date of location, name or names of locator or locators, and such a description of the claim, with reference to some natural object or permanent monument, as will identify the claim located, and may also contain such further matter as will serve to more completely describe the boundaries and locus of the claim.

20.

You are further instructed that, in locating either a placer or quartz mining claim, the order in which the acts necessary to a valid location are performed is not material. That is to say, the locator may make a discovery first, then mark the boundaries, or he may mark the boundaries first and afterwards make a discovery, provided that the rights of no other person has intervened before completion. And you are further instructed that a substantial compliance with the laws governing the location of quartz and placer mining claims is all that the law requires.

21.

You are instructed that in general it may be said that a lode or vein is a body of mineral, or a mineral body of rock within defined boundaries in the general mass of the mountain, and that the term 'lode' is



applicable, as used in the Act of Congress, above quoted, to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. Geologists claim a lode or vein of mineral matter to be a fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited. In order to constitute a lode or vein, there must be a lode or vein of mineralized rock or other like substance in place containing some of the precious metals. To constitute a discovery of a lode or vein, therefore, there must be a vein or lode in the earth's crust filled with quartz, or with some other kind of rock in place, carrying gold, silver, copper, lead, tin, zinc, cinnabar, or other valuable minerals. The width of the vein or lode is immaterial so long as it answers the above requirements. It may be thick in one place and of less extent in another. It is necessary only to discover a genuine mineral vein or lode at the point of discovery within the lines of the claim located, to entitle a miner to make a valid location thereof.

The term 'placer' as applied to a placer claim means a body of earth in which gold is found loose in sand or gravels, and not in the vein or rock in place; it includes gulch claims, old channels, cement, and drift diggings.

The term 'placer' includes every other valuable mineral deposit, excepting lodes or veins, whether in place or not in place.

## 22.

In respect to the sufficiency of discovery which will support a valid mining location, either in quartz or placer, you are instructed that "no location of a mining claim shall be made until discovery" of mineral within the limits of the claim located, and "where mineral has been found and the evidence is of such a character that a person of ordinary prudence, not necessarily a skilled miner would be justified in the further expenditure of his labor and means with reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met."

You are further instructed that when controversy is between two mineral claimants, as in this case, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, while in respect to mineral lands in controversy between mineral claimants, the question is simply which is entitled to priority. But even in this case, there must be such a discovery of mineral as gives reasonable evidence of the fact either, that there is a vein or lode carrying precious mineral, or if it be claimed as placer ground, that there is also reasonable evidence that it contains placer deposits of mineral, valuable for placer mining.

## 23

With reference to the right of possession conferred by law upon the locator of a valid mining location,

you are instructed that a valid and subsisting location of mineral lands, whether quartz or placer made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. And if, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second. Where there is a valid location of a mining claim, either quartz or placer, the area thereof becomes segregated from the public domain and the property of the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location.

The locator's right of possession arises from and follows from his location in compliance with law, and he is not required to remain on guard upon his claim and be in the physical possession of it in order to have possession thereof.

#### 24.

You are further instructed that the object of any notice or markings on the ground is to identify the claim, and to guide the subsequent locator, and to inform him as to the extent of the claim of the prior locator and whatever notice does this fairly and reasonably should be held to be a good notice.

#### 25.

You are further instructed that, where a qualified locator attempts to make a location of a mining claim, either in quartz or placer, and fails to comply substan-

tially in any respect in the performance of any of the acts necessary to constitute a valid mining location, either in quartz or placer, as herein explained to you. such location is null and void and of itself confers no rights whatever upon the locator, when the same is challenged by any subsequent locator, who complies fully with the requirements of the law as to location, even though his entry thereon be subsequent to the first attempted location.

25—a.

You are instructed that it is not necessary for a locator of a placer claim to actually and personally place substantial stakes at each corner of the claim he is attempting to locate, where any of such stakes are already in place where he desires to place them, and he may, with the consent of the owner of an adjoining claim, adopt any of such adjoining owner's stakes, which may answer his purpose at the time, but it is for the jury to say whether or not such adopted stakes substantially answer the requirements of the statute.

26.

The jury are further instructed that in order for a person to lawfully locate a mining claim for another person, it is necessary that he procure a power of attorney from such person and record the same in the judicial division in which the ground is situated and if you find from a preponderance of the evidence in this case that the plaintiff herein located the Hillside Bench placer claim for Thomas P. Aitken, then the Court instructs you that such location is void as to these defendants, as it has not been shown that he



either had or recorded a power of attorney from Thomas P. Aitken.

## 27.

You are further instructed that, where a person has a right to locate a lode claim, by reason of a valid discovery on ground open for location, he may, if he can do so peacefully, place his end line, or end lines, within the boundary of another valid location, for the purpose only of making such end lines parallel with each other.

## 28.

You are instructed that, of itself, a valid placer location gives the locator thereof no right to a known lode within its exterior boundaries merely by virtue of his placer location, and that if such known lode exists within said boundaries, he may locate the same as a lode mining claim and thereby acquire a valid right thereto in addition to his placer claim, but if he fails to locate such known lode as a lode claim, another, or others, may do so, providing they do so peaceably, and not forcibly, and not fraudulently,

## 29.

You are further instructed that, in this case, if you find, from a preponderance of the evidence, that plaintiff had a valid placer location at the time that the defendants entered upon the same, and sank a shaft into the ground within the boundaries of such placer location, in order to discover a lode or vein, not known to exist, and that thereby they did discover a lode or vein theretofore not known to exist within such boundaries of such claim, and thereupon located the same, then you are instructed that such acts upon



the part of defendants were unlawful, and that they could not initiate any title to such lode or vein, discovered and located in that manner; but, if said lode or vein was theretofore known to exist, and defendants merely uncovered the same, as one of the acts necessary to their location thereof as a lode mining claim, then you are instructed that such acts on the part of defendants were lawful, and they could initiate a good title to such known lode.

30.

You are further instructed that, where the existence of a vein or lode is not known to exist within the boundaries of a valid placer claim, no person, other than the owner of said placer claim, has the right to enter upon or into, such placer claim, for the purpose of discovering such vein or lode, and locating the same as a lode claim, and whosoever attempts to do so, without the consent of the placer claim owner, or against his knowledge or will, is a trespasser, and no rights of any nature whatsoever can be initiated to such lode or vein within the boundaries of such placer claim by any person, or persons, trespassing upon the rights of the owner of such placer mining claim; but, on the other hand, one may enter peaceably, and has the right so to do, within the boundaries of a valid placer claim, for the purpose of uncovering a vein or lode known then and theretofore to exist therein, for the purpose of locating the same and where such entry is peaceable and not forcible or fraudulent he is not a trespasser and may initiate a valid right to such known lode or vein.

## 31.

You are hereby further instructed that if you find from a preponderance of the evidence that the lode upon which defendants made a discovery on their Silver King Lode claim, described in their answer, was a known lode within the boundaries of plaintiff's alleged placer claim and that their entry upon the same and discovery of the same was made peaceably and in good faith, then you are instructed that they had a right to make such discovery, notwithstanding the prior placer location,—for a known lode, bearing gold, silver or other valuable metals within a prior located placer claim is open for location and may be located by any person qualified to make mining locations, providing that such location is made peaceably and in good faith.

## 32.

The jury are further instructed that, under the law, provision is made for the location of lode claims and for the location of placer claims, and that each claim is distinct from the other, and that it is recognized in the statutes that a valid placer claim and a valid lode claim may exist within the same superficial area, and that a lode claim located within the superficial area of a prior placer location may validly exist at the same time of the existence of the placer location and that both claims may be valid mining claims, one as a placer claim and the other as a lode claim, and both may be owned by the same person or each may be owned by a different person.

## 33.

You are further instructed that before any per-

son can at any time go upon a valid placer claim for the purpose of locating any lode or vein, the existence of such lode or vein must be a matter of knowledge, and so long as a lode or vein is not known to exist within the limits of the placer claim, it is unlawful for one to enter thereon for the purpose of prospecting for an unknown lode or vein, with the hope of discovering and locating such vein or lode, without the consent of the owner of said placer claim, or his acquiescence afterwards in and to such unlawful entry, thereby assenting thereto.

34.

You are further instructed that, before a lode is known to exist, or before it becomes a known lode or vein, there must be knowledge of its existence, as distinguished from opinion, supposition, belief or calculation.

It must also be known at least to the extent that it has already been discovered, for a lode or vein not discovered can not be said to be known to or by anybody.

It must also be a known lode of known practical value for working as a lode mining claim.

35.

You are further instructed that, when one seeks to, and does, discover and locate an unknown vein or lode within the boundaries of a valid placer claim, and posts a notice or files of record a location certificate thereof, giving the date of the discovery of an unknown lode or vein by him, as being after and subsequent to his entry thereon, he thereby admits

that the lode or vein so discovered, was, prior thereto, unknown by him, and unknown by him at the time of his entry upon such placer location.

But if one seeks to, and does, locate a known vein or lode within the boundaries of a valid placer claim, and posts a notice or files of record a location certificate thereof, giving the date of the discovery by him of such known lode or vein, as being after and subsequent to his entry thereon such date so given would be no admission that it was theretofore unknown to him and would indicate the date of his appropriation of said lode as his, and would be one of the acts required of him in locating the same in compliance with the laws of the United States and Territory of Alaska.

You are further instructed that it is equally necessary that a valid mineral discovery be made by the locator upon a known lode, to support the location thereof as a lode claim, as that such discovery be made by the locator upon an unknown lode for the same purpose.

36.

The jury are further instructed that, if they find that the defendants made a valid location of the Silver King lode claim, as described in their answer, upon a known lode, within the placer claim described in plaintiff's complaint, then the jury should find a verdict for the defendants, and should not take into consideration the width of defendants' quartz claim, as the width of the defendants' quartz claim is not involved in this case. On the other hand if said location was upon an unknown lode within



plaintiff's said placer claim, they should find for the plaintiff.

36—a.

Although there has been considerable testimony admitted in evidence as to whether defendants entered into a hole or shaft made by plaintiff, and made a discovery therein after continuing such hole or whether they, the defendants, started and sunk a new hole to make a discovery, I instruct you that as a matter of law, it is not material whether such discovery was in plaintiff's hole, or a new one. And that one of the important facts for you to determine by a preponderance of the evidence, is, whether the vein or lode claimed by defendants was known to exist, or was not known to exist, within the then boundaries of plaintiff's placer claim, at the time defendants entered; provided you find that at such time such placer claim of plaintiff's was a valid placer mining claim.

37.

You are instructed that it is uncontradicted in the evidence in this case that at the place where defendants sunk a shaft, as disclosed by the evidence, and at the bottom thereof they made a valid mineral discovery upon a certain lode or vein of rock in place, containing valuable minerals and it is contended by the defendants that at the time they commenced to sink said shaft and prior thereto, the said lode, which it is uncontradicted that they discovered, was a known lode. On the other hand it is contended by the plaintiff that said lode was an unknown lode. In the determination of the question



whether said lode was a known lode, as claimed by defendants, or an unknown lode, as claimed by the plaintiff, you should consider all the competent evidence in the case bearing upon said question at the time defendants commenced work upon said shaft and prior thereto, and not after. You should also consider the said question in the light of the then known character and topography of the land in the vicinity of and surrounding the said shaft, as disclosed by the evidence, any and all prior discoveries if any, of a lode in the vicinity of or adjacent to said shaft, the general course, direction, strike, continuity, or lack of continuity so far as then known, of any such lode then discovered, and all the acts of the parties, either plaintiff or defendants, as disclosed by the evidence, or declarations made by them or either of them, if any, in the near vicinity of the place where said shaft was sunk by defendants, and prior to the sinking thereof, together with all surrounding facts and circumstances bearing upon said matter in the entire evidence and testimony in the case, prior to the sinking of said shaft, as well as the further fact that a true fissure lode or vein is admitted by plaintiff to have been discovered in the month of August, 1920, by J. B. Quigley, within the limits of the Hillside Bench Placer Claim, as claimed by the plaintiff to have been originally staked and located by him upon the 20th day of April, 1920.

38.

You are instructed that, if you find from a preponderance of the evidence, that the plaintiff had a valid placer mining location, known as the Hillside

Bench Placer Claim, by virtue of location thereof, made on the 20th day of April, 1920, and that thereafter J. B. Quigley made a valid location of the lode claim known as the Red Top Lode Claim, extending through the upper side line of the said Hillside Bench Placer Claim, within the boundaries thereof, and that such location was made by said Quigley with the acquiescence of the plaintiff or that he did not object thereto then I instruct you that the appropriation of a part of plaintiff's placer claim by the said Quigley would not operate against the plaintiff so as to deprive him of any portion of the balance of his said claim or of any portion of the said Hillside Bench Placer Claim not included in Quigley's location of the Red Top Lode Claim.

39.

You are further instructed that prospectors and locators of mining claims in Alaska, who are generally neither surveyors nor lawyers, in locating upon the unsurveyed mineral lands, frequently locate claims which are in excess in area of the amount allowed by law, and that, unless the excess is unreasonably large, the location is valid. The excess, that is to say the amount over twenty acres, in a single placer claim, can be located by any person without the consent of the placer claimant, providing such excess is taken from the end farthest away from the initial stake. You are further instructed that the locator may also voluntarily cast off the excess or any part thereof from his claim; and if you find, from a preponderance of the evidence, that, prior to the entry of defendants upon the Hillside Bench Placer Claim

as claimed by the plaintiff, the plaintiff did cast off, by agreement, expressed or implied, with one J. H. Quigley, any portion of plaintiff's placer claim as originally located and claimed, or if you find, from a preponderance of the evidence, that said Quigley made a valid location of his Red Top Lode Claim, partly within the boundaries of and covering a part of plaintiff's placer claim, and that plaintiff either acquiesced in or did not object to the act of Quigley, or to said Quigley's location of said Red Top Lode Claim, then such part thereof as was either so cast off by plaintiff, or included in said Quigley's location with the consent or acquiescence of plaintiff, could not thereafter be deemed to be a part of plaintiff's placer location; provided, however, that you find from a preponderance of the evidence that at the time of entry of defendants upon the said Hillside Bench Placer Claim, the same was a valid placer mining location of plaintiff's.

## 40.

You are further instructed that if you find from a preponderance of the evidence that one J. B. Quigley, prior to the discovery and location of defendants of the Silver King Mining Lode as claimed by them, made a valid quartz location known as the Red Top Lode Claim, partly within the boundaries of plaintiff's placer mining claim, with the consent of plaintiff or that the said plaintiff either acquiesced in or did not object to said Quigley's location of said Red Top Lode Claim, that then the portion of said Quigley's Red Top Lode claim lying within the boundaries of plaintiff's placer claim as originally located, could

not thereafter be deemed to be any part of plaintiff's said placer claim, and that these facts, if you find by the preponderance of testimony that such facts exist, may be taken into consideration by you in determining whether the vein or lode located by defendants was, or was not, a known vein within the limits of plaintiff's placer claim, before, or at the time, defendants discovered and located the Silver King Lode Mining Claim, as claimed by them; provided, however, that you find from a preponderance of the evidence that, at the time of defendants' discovery and location, plaintiff was the owner of a valid placer mining claim, known as the Hillside Bench Placer Mining Claim.

41.

You are instructed that it is proven by the plaintiff, and conceded by the defendants, that J. B. Quigley, in the month of August, 1920, made a valid location of what is known as the Red Top Lode Claim, as described in the evidence herein, and you are further instructed that there is no controversy in this case between the plaintiff, herein, and one J. B. Quigley, although the consideration of the evidence, herein, may relate to the claim of said Quigley; and you are hereby instructed that any verdict you may render in this case will not affect any controversy between said Quigley or plaintiff which may, or may not, hereafter arise, or the rights of any person not named as a party in this suit.

42.

You are instructed that if you find and believe



from a preponderance of all the evidence in the case that the plaintiff, William Grant, made a valid location of the Hillside Bench Placer Claim, as claimed by him, which he completed on the 20th day of April, 1920, and that in said year, or prior to July 1, 1921, he performed annual assessment work thereon, as required by law, to the extent of at least \$100.00 and if you further find from the preponderance of evidence that the lode or vein containing rock in place thereafter discovered on the 6th day of June, 1921, by the defendants, was theretofore unknown and not known to exist within the boundaries of said Hillside Bench Placer Claim as reduced in area following Quigley's location, if you find from a preponderance of the evidence it was so reduced in areas, then I instruct you that at the time of the entry of the defendants, upon said Hillside Bench Placer Claim to prospect for said unknown lode, they, the defendants, could not initiate any right or title to said lode, as against the plaintiff, Grant, and you should return a verdict for the plaintiff.

You are further instructed, however, that if you find from a preponderance of evidence that the lode so discovered by the defendants was, at the time of the entry of defendants thereon, a known lode, known to exist within the boundaries of the plaintiff's Hillside Bench Placer Claim as reduced in area as aforesaid, by the Quigley location of the Red Top Lode Claim, then and in that case, even though the plaintiff Grant, had then and theretofore a valid prior placer location, known as the Hillside Bench



Placer Claim, within the boundaries of which, as reduced in areas following the aforesaid Quigley location, said known lode existed; the defendants herein had a legal right to locate said lode under the laws of the United States and of this Territory, and if you find from a preponderance of the evidence that they did so locate said lode substantially in the manner prescribed by law, as heretofore given to you in these instructions, or that they had made no valid location thereof, but were actually in possession thereof at the time of its commencement of this action, you should find for the defendants.

You are further instructed that possession which is actual and notorious would prevail against one who has neither title or possession.

43.

You are instructed that, if you find, from a preponderance of the evidence, that the lode in controversy herein was, on the 6th day of June, 1921, upon open, unappropriated public mineral lands of the United States, and not subject in any way to the rights of the plaintiff, Grant, by virtue of his location, as claimed by him, of the Hillside Placer Claim, and by virtue of the said lode being then and theretofore an unknown lode, as claimed by him, then you should consider the respective rights, if any, which either the plaintiff or the defendants have, by virtue of their claimed locations of said lode as lode mining claims.

The defendants claim that they located the Silver King Mining Lode on June 6th., 1921, and the plaintiff claims he located the Hillside Lode Claim on the 25th day of July, 1921.

It is for the jury, from the preponderance of the whole evidence, and these instructions, to say whether or not the defendants made a valid quartz mining location upon the Silver King Lode Claim on the 6th day of June, 1921.

If you find, from a preponderance of the evidence, that they did so, then the said lode could not thereafter be legally appropriated or located by the plaintiff, Grant, on July 25, 1921.

On the other hand, if you find that the defendants did not make a valid location of the Silver King Lode Claim on June 6, 1921, then the same would be open and unappropriated and as if no such attempted location by them had been made, and said plaintiff, Grant, could lawfully locate the same on July 25th, 1921, and in that case, it is for you to say and find whether the plaintiff, Grant, did or did not make a valid location of the Hillside Lode Claim on July 25th, 1921.

From the evidence in the whole case and from the instructions heretofore and now and hereafter herein given you, it is for you to say and find what the facts are in respect to the validity of these respective lode locations, of the defendants on the one hand and of the plaintiff on the other, bearing in mind that he who is prior in point of time is prior in right, and bearing in mind also all of the acts necessary and essential to constitute the location of a valid lode or quartz mining location under the law, as heretofore in these instructions specifically laid down, especially with reference to qualifications of the locator, and

to discovery, marking on the ground of the boundaries so they can be readily traced, size and character and numbering of stakes, and writing thereon, and recording of notice of location within ninety (90) days from the date of discovery, and the contents of said notice.

## 44.

You are instructed that it is not necessary that a locator should be the first discoverer of mineral in order to make a valid location, but in order to do so upon a prior discovery by another person, such discovery must not only be a valid mineral discovery, but he must have knowledge of the former discovery, and such actual discovery must be adopted and claimed by him in order to give validity to his location.

Therefore if you find from a preponderance of the evidence that the defendants did not make a valid location of the Silver King Lode Claim, but made a valid mineral discovery thereon, of which the plaintiff, Grant, had actual knowledge, and that he actually adopted and claimed said discovery, then such adoption and claim by him to the former discovery by defendants would serve for him as a valid discovery to support his location of the Hillside Lode Claim, provided you find from a preponderance of evidence that said lode was not theretofore legally appropriated by the defendants in the Silver King Lode Claim, as claimed by them.

## 45.

You are further instructed that since you are the sole judges of all facts which have been proven in the trial, you should not permit remarks or expres-

sions of opinions by counsel to influence your judgment, except as the same conform to the facts proven, or are reasonably deducible from such facts and the law of the case as laid down in these instructions.

## 46.

You are instructed that you should consider no evidence sought to be introduced but excluded by the Court, nor should you consider any evidence stricken from the record by the Court, nor should you take into consideration in making up your verdict any knowledge or information known to you, not derived from the evidence given by the witnesses on the witness stand. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return, as you have sworn so to do.

## 47.

You are instructed that it is manifestly impossible for the Court to cover the law of this case in merely one, or even a few instructions, and therefore, you should not single out any one instruction to the exclusion of all others as governing the decision of this case, but you should carefully and seriously consider all these instructions on the law of the case together and not disconnectedly.

Pursuant to these instructions I have prepared two forms of verdict which you will take into the jury room and you will sign the one upon which you unanimously agree and return it into Court as your verdict. The other form you will destroy.

The first form of verdict finds in favor of the plaintiff and the second in favor of the defendants.



Herewith I hand you these instructions for your guidance, together with such exhibits as have been introduced in evidence, and the pleadings in the case, and the forms of verdict above mentioned.

Cecil H. Clegg, District Judge.

Dated at Fairbanks, Alaska this 9th day of February 1922.

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(Title of Court and Cause.)

**Instructions Tendered on Behalf of Defendants and  
Refused by the Court.**

**IX.**

The jury are further instructed that a perfected placer location prior to application for patent does not preclude others from entering upon the same and discovering and locating unknown veins or lodes provided entry for the purpose can be made peaceably and the jury are instructed that if these defendants entered upon the Hillside Bench placer mining claim peaceably and in good faith and prospected thereon and discovered thereon a vein or lode and located as a result of such discovery the Silver King lode mining claim, then you should find a verdict in favor of defendants.

Refused—Cecil H. Clegg, Judge.

Exception—Exception allowed—Cecil H. Clegg, Judge.

**X.**

The jury are further instructed that a prospector may enter a prior placer mining location and make a discovery on an unknown lode which will be a val-



id lode claim providing he complies with the law in making such a location provided that his entry upon the placer claim shall be made peaceably, openly, notoriously and in good faith and shall have been made before an application for patent has been made by the placer locator.

Refused—Cecil H. Clegg, Judge.

Exception—Exception allowed—Cecil H. Clegg, Judge.

## XII.

'The jury are further instructed that if they find that the defendants entered upon the superficial area of the Hillside Bench placer mining claim peaceably and in good faith and without interruption made a discovery of a vein or lode of rock in place and peaceably and quietly marked the exterior boundaries of the same and posted a notice of location as required by law, and recorded the same, then you should find for the defendants and in that case the width of defendants' Silver King Lode Mining Claim would be reduced in width to twenty-five feet on each side of the center of the vein.

Refused—Cecil H. Clegg, Judge.

Exception—Exception allowed—Cecil H. Clegg, Judge.

## XIII.

The jury are further instructed that an owner of a placer mining claim may consent to a prospector entering upon and prospecting for an unknown lode and if plaintiff consented either to defendants entering upon the Hillside Bench placer claim and prospecting or if he consented to their prospecting after

entry, or if he consented to their working upon the lode after discovery made, then you should find for the defendants and you are authorized to take into consideration the conduct of the plaintiff toward these defendants whether or not he permitted them to work upon the placer claim after he knew that they were working thereon and whether or not he failed to object to their continuing work after he knew that they had made a discovery of a lode on said placer claim all for the purpose of arriving at a conclusion as to whether or not plaintiff consented at any time to their working on said placer claim for the purpose of locating a lode or for the purpose of working a lode after they had discovered the same.

Refused—Cecil H. Clegg, Judge.

Exception—Exception allowed—Cecil H. Clegg, Judge.

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### **Defendants' Exceptions to Court's Instructions to the Jury.**

BY MR. ROTH:

#### **Instruction No. 18.**

Exception taken to that part of Instruction No. 18 which refers to the right of exclusive possession of a placer location, upon the ground and for the reason that it does not embody an entry for the purpose of locating a known lode.

#### **Instruction No. 20.**

Exception taken to that part of Instruction No. 20 which states that a substantial compliance with the laws covering the location of quartz and placer min-

ing claims is all the law requires, for the reason that same is contrary to law.

Instruction No. 22.

Exception taken to that portion of Instruction No. 22 which provides that where a controversy is between two mineral claimants, as in this case, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that the same contemplates and conveys the idea to the jury that a placer claim and a lode claim are similar in character, whereas, they are different in character and the rule as between those two classes of mineral locators is the same practically as the rule between a mineral and agricultural claimant.

Instruction No. 23.

Exception taken to that part of Instruction No. 23 referring to the right of possession of an owner of a valid placer location, because it does not take into consideration the entry of another for the purpose of locating a known lode.

Instruction No. 24.

Exception taken to Instruction No. 24 and the whole thereof on the ground and for the reason that same does not state the law correctly, as it would leave the question as to a compliance with the statute in order to initiate a valid mining claim, as to whether or not the notices could be reasonably considered to give notice, whereas the statute states specifically what it must contain.

## Instruction No. 25—a.

Exception taken to Instruction No. 25—a upon the ground and for the reason that same is contrary to requirements of the statutes compelling a locator of a placer mining claim to place stakes at each corner or angle of the claim.

## Instruction No. 29.

Exception taken to Instruction No. 29 because it declares that an entry upon a valid placer mining claim for the purpose of discovering an unknown lode is in any event invalid, whereas under the law, if the entry is made peaceably and in good faith, the entry will be valid.

## Instruction No. 30.

Exception taken to Instruction No. 30 upon the grounds and for the reason stated in exception to Instruction No. 29.

## Instruction No. 33.

Exception taken to Instruction No. 33 upon the ground and for the reason expressed in exceptions to Instructions Nos. 29 and 30.

## Instruction No. 35.

Exception taken to the first paragraph of Instruction No. 35 upon the ground and for the reason that it is not a statement of the law covering the subject.

## Instruction No. 36

Exception taken to the latter portion of Instruction No. 36 which refers to an entry upon an unknown lode upon the ground and for the reason that same is contrary to law.



## Instruction No. 36—a.

Exception taken to that part of Instruction No. 36—a which refers to the entry being confined to the location of a vein or lode known to exist, for the reason that where an entry is made peaceably and in good faith and an unknown lode discovered a mining claim located as a result of such discovery is valid.

## Instruction No. 38.

Exception taken to Instruction No. 38 upon the ground and for the reason that any entry of J. B. Quigley on the Hillside Bench Placer Claim and a discovery of a lode by him within the exterior boundaries of said Hillside Placer Claim would make it a known lode within the exterior boundaries of such placer claim, and for the further reason that it does not take into consideration the evidence which goes to prove that J. B. Quigley made a discovery of a lode within the exterior boundaries of the Hillside Bench Placer Claim before he staked the Red Top Lode Claim, and before he received any promise or right by any owner of the Hillside Bench Placer Claim or with their consent or with their knowledge.

## Instruction No. 39.

Exception taken to that portion of Instruction No. 39 which refers to the casting off of any part of the Hillside Bench Placer Claim, upon the ground and for the reason that there is no evidence in the case that such owner ever cast off any portion of the same.

## Instruction No. 40.

Exception taken to Instruction No. 40 and that por-



tion of same which instructs the jury that any part of the Hillside Bench Placer Mining Claim was, or could be, eliminated from the boundaries of the Hillside Bench Placer Claim by virtue of any location of the Red Top Quartz Claim by J. B. Quigley.

Instruction No. 42.

Exception taken to Instruction No. 42 and that portion thereof which instructs the jury that any location of the Red Top Lode Mining Claim by J. B. Quigley would or could under any circumstances reduce the exterior boundaries of the Hillside Bench Placer Claim, or that in the event of such location, that a discovery of a lode on the same could not be considered as being within the exterior boundaries of the Hillside Bench Placer Mining Claim, the same being contrary to law.

Exception was taken by the defendants to each and all of the instructions mentioned, to-wit: 18, 20, 22, 23, 24, 25a, 29, 30, 33, 35, 36, 36a, 38, 39, 40 and 42 and that said exceptions were taken in the presence of the jury, in open Court, at the conclusion of the trial and before the said cause was submitted to the said jury and that each and all of said exceptions were duly allowed by the Court and the same are now allowed.

And now, in furtherance of justice and that right may be done, the defendants present the foregoing Bill of Exceptions in this cause and pray that the same may be settled and allowed and signed and cer-

tified by the Judge of this Court, in the manner prescribed by law.

R. F. ROTH

Attorney for Defendants.

I hereby certify that the foregoing is a full, true and correct copy of the Bill of Exceptions in the above entitled cause.

R. F. ROTH.

Attorney for Defendants

Service of a copy of the foregoing proposed Bill of Exceptions is hereby acknowledged this 25th day of April, 1922, at Fairbanks, Alaska.

MORTON E. STEVENS

Attorney for Plaintiff

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(Title of Court and Cause.)

**Order Settling and Allowing Bill of Exceptions**

BE IT REMEMBERED that upon the 7th day of August, 1922, the above named defendants presented their Bill of Exceptions to the above entitled Court for allowance and settlement, which said proposed Bill of Exceptions was served and filed within the time allowed by the order of this Court and was duly presented to this Court for settlement as required by law and the rules of this Court, and which said Bill of Exceptions consists of the foregoing typewritten pages of the proceedings and testimony of the witnesses offered and given by the respective parties upon the trial of said cause, as well as the exhibits introduced on the trial thereof and all documentary and other evidence given on said trial.

And in appearing to the Court from the examination of said Bill of Exceptions that the same contains all the evidence, testimony and exhibits introduced upon the trial of said cause, as well as all and singular the proceedings had therein not of record, and is in all respects true and correct.

Now therefore, on motion IT IS HEREBY ORDERED AND ADJUDGED that the foregoing type-written pages from 1 to 632 inclusive, be and the same is hereby approved, allowed and settled as the Bill of Exceptions of the above entitled cause and made a part of the record thereof.

AND IT IS FURTHER ORDERED AND ADJUDGED that the foregoing Bill of Exceptions consists of all of the evidence, testimony, exhibits and proceedings upon the trial of the above entitled cause not appearing of record and that the foregoing Bill of Exceptions is in all respects true and correct, and the same is hereby settled and allowed.

Done at Fairbanks, Alaska, this 8th day of August, 1922.

CECIL H. CLEGG

District Judge

Entered in Court Journal No. 15 page 495.

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Aug. 8, 1922. Rob't. W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

Lodged April 28, 1922. Rob't W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

Filed in the District Court, Territory of Alaska, 4th

Div. Aug. 8, 1922, Rob't. W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

### **Verdict**

We, the jury, duly empaneled and sworn to try the issues in the above entitled case, find a verdict in favor of plaintiff, and that the plaintiff, herein, is entitled to the possession of the property described in plaintiff's complaint, expressly excluding therefrom that part covered by the location of J. B. Quigley, known as the Red Top Lode Claim.

Dated at Fairbanks, Alaska, this 10 day of February, 1922.

H. W. ATTWOOD.

Foreman.

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Feb 10, 1922 Rob't. W. Taylor, Clerk by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

### **JUDGMENT**

This cause came on regularly for trial before a jury on February 1st, 1922, the plaintiff appearing in person and by his attorney, and the defendants Campbell and Tobin, appearing in person and by their attorney, whereupon a jury of twelve men were regularly empaneled and sworn to try said action.

Witnesses on the part of plaintiff and defendants were sworn and examined, and documentary evidence



was introduced by the respective parties, and said trial continued from day to day, and after the respective parties herein, had introduced their evidence, and after the arguments of counsel and the instructions of the Court, the jury retired to consider of their veridict, and on February 10th, 1922, said jury returned into Court, and being called answered to their names, and thereupon rendered a verdict as follows:

"We, the jury, duly empaneled and sworn to try the issues in the above entitled case, find a verdict in favor of plaintiff, and that the plaintiff, herein, is entitled to the possession of the property described in plaintiff's complaint, expressly excluding therefrom that part covered by the location of J. B. Quigley, known as the Red Top Lode Claim.

Dated at Fairbanks, Alaska, this 10th day of February, 1922.

H. W. Attwood, Foreman.

That afterwards, to wit, on the 11th day of February, 1922, defendants, Campbell and Tobin, filed, herein, their motion for a new trial. That thereafter, and on the 24th day of February, 1922, said motion for a new trial was presented by defendants and argued by the respective counsel, herein, whereupon the Court overruled said defendants' motion for a new trial.

WHEREFORE by virtue of the law, and the reason of the premises, aforesaid:

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff herein, William Grant, is the owner



of and is entitled to the possession of, and that he do have and recover from the defendants, herein, the possession of all and singular that certain tract of placer mining ground known as the Hill Bench Claim, containing twenty acres more or less, being opposite to, and adjoining and lying east of the Horse Shoe Placer Mining Claim on the right limit of Moose Creek, being 1320 feet, more or less, in length, and 660 feet, more or less in width; saving and excepting, and expressly excluding therefrom that portion covered by the location of J. B. Quigley known as the Red Top Lode Claim, in the Kantishna Precinct, Alaska; Also, all and singular, that certain quartz mining ground known as the Hillside Lode Claim, the center upper end post of said claim being within the boundaries of the above described placer mining claim and situate about 160 feet, more or less, downhill and in a westerly direction from the mouth of what is known as the Quigley Tunnel, said post being the discovery post on which the notice of location of said claim is posted; Thence running in a westerly direction and downhill along the vein, through said Hill Bench and Horse Shoe Placer Claims, a distance of 1500 feet to the center lower end line post of said quartz claim. The side lines of said Hillside Lode Claim running parallel to said lode, and twenty-five feet on either side of the center of the vein, in said Kantishna Precinct, Alaska.

That plaintiff do have and recover from said defendants plaintiff's costs and disbursements incurred in said action to be taxed.

Dated this 20th day of March, 1922.

CECIL H. CLEGG

District Judge

Entered in Court Journal No. 15, page 357.

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Mar. 20, 1922, Robt. W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

**Stipulation Relative to Value of Property in Controversy.**

IT IS HEREBY STIPULATED AND AGREED that the value of the property in controversy in this action exceeds the sum of Five Hundred dollars (\$500.00), and that the Judge of the above entitled court may make a finding in accordance herewith.

MORTON E. STEVENS

A ttorney for Plaintiff

R. F. ROTH

Attorney for Defendant

Indorsed:

Filed in the District Court for the Territory of Alaska 4th Div. Sep 7, 1922, Rob't. W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

**Order Approving Valuation of Property**

Upon the agreement and stipulation of the parties in the above entitled cause that the property in controversy in this case is in excess of the value of

Five Hundred Dollars (\$500.00), the Court hereby finds that the same is true as a matter of fact.

Dated: Fairbanks, Alaska, September 7th, 1922.

CECIL H. CLEGG .

District Judge

Entered in Court Journal No. 15 page 512.

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922. Rob't. W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

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Title of Court and Cause)

### **Supersedeas Order**

The defendants, William J. Campbell and J. L. Tobin, having this day filed their petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals in and for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which defendants should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Circuit, and said petition having this day been duly allowed:

NOW, THEREFORE, IT IS ORDERED that upon said defendants above named filing with the Clerk of this Court a good and sufficient Bond in the sum

of \$1000.00, and to the effect that if said defendants and plaintiffs in error shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings in this court be, and they are hereby, suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 7th day of September, 1922.

CECIL H. CLEGG

District Judge

Entered in Court Journal No. 15 page 512.

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922, Rob't W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, That we, William J. Campbell and J. L. Tobin, as principals and John Barrack and M. J. McDermott as sureties are held and firmly bound unto William Grant plaintiff above named, in the sum of One Thousand Dollars (\$1000.00), to be paid to the said plaintiff, his executors or administrators, for which payment well and truly to be made we bind ourselves, and each of our heirs, administrators or assigns, firmly by these



presents, sealed with our seals and dated the 7 day of September, 1922.

WHEREAS, the above named defendants William J. Campbell and J. L. Tobin, have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, the condition of this obligation is such that if the above named defendants shall prosecute said writ to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

Dated this 7th day of September, 1922.

Wm. J. CAMPBELL (SEAL)

J. L. TOBIN, (SEAL)

Principals.

JOHN BARRACK (SEAL)

M. J. McDERMOTT, (SEAL)

Sureties

United States of America. }  
Territory of Alaska } ss.

John Barrack and M. J. McDermott sureties on the within and foregoing appeal and supersedeas bond, being first duly sworn, each for himself deposes and says; that he is a resident within the District of Alaska, that he is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that he is worth the amount specified in the foregoing bond over



and above all debts and liabilities and exclusive of property exempt from execution.

JOHN BARRACK  
M. J. McDERMOTT

Subscribed and sworn to before me this 7th day of September, 1922.

R. F. ROTH

Notary Public for Alaska. My com-  
mission expires November 14, 1925.

(SEAL)

APPROVED; this 7th day of September, 1922.

CECIL H. CLEGG

Judge of the District Court.

Indorsed:

Filed in the District Court Territory of Alaska,  
4th Div. Sep. 7, 1922, Rob't W. Taylor, Clerk, by  
R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

### **Assignment of Errors**

Come now the defendants in the above entitled cause, being the plaintiffs in error, and assign the following errors as having been committed by the above entitled court on the trial of the above entitled action, which errors the said defendants intend and do rely upon on their Writ of Error to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit.

#### **I.**

The court erred in permitting the introduction of Plaintiff's Exhibit "B", which purports to be a "No-

tice of Location of Placer Claim," over the objection of defendants which said Notice is as follows:

### Notice of Location of Placer Claim

Notice is hereby given that I, Wm. Grant, have discovered placer gold within the limits of this claim and have this day posted this notice of Location at the point of discovery. I claim 1320 feet in length by 660 feet in width as marked on the ground, for placer mining purposes. This claim shall be known as placer mining claim Hill Bench, opposite and on the East side of Horseshoe placer mining claim on the Right Limit of Moose Creek, Kantishna precinct, Territory of Alaska.

Discovery made Sept. 10, 1919. Location notice posted April 1920.

Witness:

Wm. Grant.

J. Hamilton.

Locator.

(Endorsement)

District of Alaska

Fourth Judicial Division

} ss.

Filed for record at request of Wm. Grant, on the 12th day of July 1920 at      min. past 4:30 P. M. and recorded in Vol. 1, Gen., page 58.

Kantishna Recording District.

C. Herbert Wilson. Per L. E. W.

Recorder

## II.

The court erred in denying defendants' motion for a non-suit.

### III

The court erred in permitting John A. Davis, called as a witness for the defendants, from testifying on the ground that he was superintendent of the Alaska Station of the United States Bureau of Mines.

### IV.

The court erred in denying defendants' motion for a non-suit made at the close of the evidence and just before argument.

### V.

The court erred in refusing to instruct the jury as requested on behalf of the defendants as follows:

"The jury are further instructed that a perfected placer location prior to application for patent does not preclude others from entering upon the same and discovering and locating unknown veins or lodes provided entry for the purpose can be made peaceably; and the jury are instructed that if these defendants entered upon the Hillside Bench placer mining claim peaceably and in good faith and prospected thereon and discovered thereon a vein or a lode and located, as a result of such discovery, the Silver King lode mining claim, then you should find a verdict in favor of defendants."

### VI.

The court erred in refusing to instruct the jury as requested by the defendants as follows:

"The jury are further instructed that a prospector may enter a prior placer mining location and make a discovery on an unknown lode which will be a valid lode claim provided he complies with the law in making such a location, provided that his entry upon the

placer claim shall be made peaceably, openly, notoriously and in good faith and shall have been made before an application for patent has been made by the placer locator."

## VII.

The court erred in refusing to instruct the jury as requested by the defendants as follows:

"The jury are further instructed that if they find that the defendants entered upon the superficial area of the Hillside Bench placer mining claim peaceably and in good faith and without interruption made a discovery of a vein or a lode of rock in place and peaceably and quietly marked the exterior boundaries of the same and posted a notice of location as required by law and recorded the same, then you should find for the defendants and in that case the width of defendants' Silver King Lode Mining Claim would be reduced in width to 25 feet on each side of the center of the vein."

## VIII.

The court erred in refusing to instruct the jury as requested on behalf of defendants as follows:

"The jury are further instructed that an owner of a placer mining claim may consent to a prospector entering upon and prospecting for an unknown lode, and if plaintiff consented either to defendants entering upon the Hillside Bench placer claim and prospecting, or if he consented to their prospecting after entry, or if he consented to their working upon the lode after discovery made, then you should find for the defendants and you are authorized to take into consideration the conduct of the plaintiff toward



these defendants, whether or not he permitted them to work upon the placer claim after he knew that they were working thereon, and whether or not he failed to object to their continuing work after he knew that they had made a discovery of a lode on said placer claim; all for the purpose of arriving at a conclusion as to whether or not plaintiff consented at any time to their working on said placer claim for the purpose of locating a lode or for the purpose of working a lode after they had discovered the same."

### IX.

The court erred in instructing the jury as is contained in instruction No. 18 of the court's instructions to the jury, which is as follows:

"You are further instructed that when a placer location has been completed, it becomes property in the highest sense of the term, and is equivalent to a grant from the government subject only to the condition imposed of performing annual labor thereon until patent is applied for, and the owner of such valid placer location is entitled to the exclusive possession thereof, and to everything underneath, including any unknown lode or lodes, but he acquires no title or right of possession to any known lode or lodes."

### X.

The court erred in instructing the jury as is contained in instruction No. 20 of the court's instructions to the jury, which is as follows:

"You are further instructed that in locating either a placer or quartz mining claim, the order in which the acts necessary to a valid location are performed is not material. That is to say, the locator may make



a discovery first, then mark the boundaries, or he may mark the boundaries first and afterwards make a discovery, provided that the rights of no other person has intervened before completion. And you are further instructed that a substantial compliance with the laws governing the location of quartz and placer mining claims is all that the law requires."

### XI.

The court erred in instructing the jury as is contained in instruction No. 22 of the court's instructions to the jury, which is as follows:

"In respect to the sufficiency of discovery which will support a valid mining location, either in quartz or placer, you are instructed that 'no location of a mining claim shall be made until discovery' of mineral within the limits of the claim located and 'where mineral has been found and the evidence is of such a character that a person of ordinary prudence, not necessarily a skilled miner, would be justified in the further expenditure of his labor and means with reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.'

You are further instructed that when controversy is between two mineral claimants, as in this case, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, while in respect to mineral lands in controversy between mineral claimants, the question is

simply which is entitled to priority. But even in this case, there must be such a discovery of mineral as gives reasonable evidence of the fact either, that there is a vein or lode carrying precious mineral, or if it be claimed as placer ground, that there is also reasonable evidence that it contains placer deposits of mineral valuable for placer mining."

## XII

The court erred in instructing the jury as is contained in instruction No. 23 of the court's instructions to the jury, which is as follows:

"With reference to the right of possession conferred by law upon the locator of a valid mining location, you are instructed that a valid and subsisting location of mineral lands, whether quartz or placer, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. And if, when one enters on land to make a location, there is another location in full force, which entitled its owner to the exclusive possession of the land, the first location operates as a bar to the second. Where there is a valid location of a mining claim, either quartz or placer, the area thereof becomes segregated from the public domain and the property of the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location.

The locator's right of possession arises from and follows from his location in compliance with law, and he is not required to remain on guard upon his claim

and be in the physical possession of it in order to have possession thereof."

### XIII.

The court erred in instructing the jury as is contained in instruction No. 24 of the court's instructions to the jury, which is as follows:

"You are further instructed that the object of any notice or markings on the ground is to identify the claim, and to guide the subsequent locator, and to inform him as to the extent of the claim of the prior locator and whatever notice does this fairly and reasonably should be held to be a good notice."

### XIV

The court erred in instructing the jury as is contained in instruction No. 25a of the court's instructions to the jury, which is as follows:

"You are instructed that it is not necessary for a locator of a placer claim to actually and personally place substantial stakes at each corner of the claim he is attempting to locate where any of such stakes are already in place where he desires to place them, and he may, with the consent of the owner of an adjoining claim, adopt any of such adjoining owner's stakes which may answer his purpose at the time, but it is for the jury to say whether or not such adopted stakes substantially answer the requirements of the statute."

### XV.

The court erred in instructing the jury as is contained in instruction No. 29 of the court's instructions to the jury, which is as follows:

"You are further instructed that, in this case, if you find, from a preponderance of the evidence, that plaintiff had a valid placer location at the time that the defendants entered upon the same, and sank a shaft into the ground within the boundaries of such placer location, in order to discover a lode or vein, not known to exist, and that thereby they did discover a lode or vein theretofore not known to exist within such boundaries of such claim, and thereupon located the same, then you are instructed that such acts upon the part of the defendants were unlawful, and that they could not initiate any title to such lode or vein, discovered and located in that manner; but, if said lode or vein was theretofore known to exist, and defendants merely uncovered the same, as one of the acts necessary to their location thereof as a lode mining claim, then you are instructed that such acts on the part of defendants were lawful, and they could initiate a good title to such known lode."

## XVI

The court erred in instructing the jury as is contained in instruction No. 30 of the court's instructions to the jury, which is as follows:

"You are further instructed that, where the existence of a vein or lode is not known to exist within the boundaries of a valid placer claim, no person other than the owner of said placer claim, has the right to enter upon or into, such placer claim, for the purpose of discovering such vein or lode, and locating the same as a lode claim, and whosoever attempts to do so, without the consent of the placer



claim owner, or against his knowledge or will, is a trespasser, and no rights of any nature whatsoever can be initiated to such lode or vein within the boundaries of such placer claim by any person, or persons, trespassing upon the rights of the owner of such placer mining claim; but, on the other hand, one may enter peaceably, and has the right so to do, within the boundaries of a valid placer claim, for the purpose of uncovering a vein or lode known then and theretofore to exist therein, for the purpose of locating the same and where such entry is peaceable and not forcible or fraudulent he is not a trespasser and may initiate a valid right to such known lode or vein."

#### XVII.

The court erred in instructing the jury as is contained in instruction No. 33 of the court's instructions to the jury, which is as follows:

"You are further instructed that before any person can at any time go upon a valid placer claim for the purpose of locating any lode or vein, the existence of such lode or vein must be a matter of knowledge, and so long as a lode or vein is not known to exist within the limits of the placer claim, it is unlawful for one to enter thereon for the purpose of prospecting for an unknown lode or vein, with the hope of discovering and locating such vein or lode, without the consent of the owner of said placer claim, or his acquiescence afterwards in and to such unlawful entry, thereby assenting thereto."

#### XVIII.

The court erred in instructing the jury as is con-



tained in instruction No. 35 of the court's instructions to the jury, which is as follows:

"You are further instructed that, when one seeks to, and does, discover and locate an unknown vein or lode within the boundaries of a valid placer claim and posts a notice or files of record a location certificate thereof, giving the date of the discovery of an unknown lode or vein by him, as being after and subsequent to his entry thereon, he thereby admits that the lode or vein so discovered, was, prior thereto unknown by him, and unknown by him at the time of his entry upon such placer location.

But if one seeks to, and does, locate a known vein or lode within the boundaries of a valid placer claim, and posts a notice or files of record a location certificate thereof, giving the date of the discovery by him of such known lode or vein, as being after and subsequent to his entry thereon, such date so given would be no admission that it was theretofore unknown to him, and would indicate the date of his appropriation of said lode as his, and would be one of the acts required of him in locating the seam in compliance with the laws of the United States and Territory of Alaska.

You are further instructed that it is equally necessary that a valid mineral discovery be made by the locator upon a known lode, to support the location thereof as a lode claim as that such discovery be made by the locator upon an unknown lode for the same purpose."

## XIX.

The court erred in instructing the jury as is contained in instructions No. 36 of the court's instructions to the jury, which is as follows:

"The jury are further instructed that, if they find that the defendants made a valid location of the Silver King lode claim, as described in their answer, upon a known lode, within the placer claim described in plaintiff's complaint, then the jury should find a verdict for the defendants, and should not take into consideration the width of defendants' quartz claim, as the width of defendants' quartz claim is not involved in this case. On the other hand if said location was upon an unknown lode within plaintiff's said placer claim, they should find for the plaintiff."

## XX.

The court erred in instructing the jury as is contained in instruction No. 36—a of the court's instructions to the jury, which is as follows:

"Although there has been considerable testimony admitted in evidence as to whether defendants entered into a hole or shaft made by plaintiff, and made a discovery therein after continuing such hole, or whether they, the defendants, started and sunk a new hole to make a discovery, I instruct you that as a matter of law, it is not material whether such discovery was in plaintiff's hole, or a new one. And that one of the important facts for you to determine, by a preponderance of the evidence, is whether the vein or lode claimed by defendants was known to exist, or was not known to exist,

within the then boundaries of plaintiff's placer claim, at the time defendants entered; provided you find that at such time such placer claim of plaintiff's was a valid placer mining claim."

### XXI.

The court erred in instructing the jury as is contained in instruction No. 38 of the court's instructions to the jury, which is as follows:

"You are instructed that, if you find from a preponderance of the evidence, that the plaintiff had a valid placer mining location, known as the Hillside Bench Placer Claim, by virtue of location thereof, made on the 20th day of April, 1920, and that thereafter J. B. Quigley made a valid location of the lode claim known as the Red Top Lode Claim, extending through the upper side line of the said Hillside Bench Placer Claim, within the boundaries thereof, and that such location was made by said Quigley with the acquiescence of the plaintiff, or that he did not object thereto, then I instruct you that the appropriation of a part of plaintiff's placer claim by the said Quigley would not operate against the plaintiff so as to deprive him of any portion of the balance of his said claim or of any portion of the said Hillside Bench Placer Claim not included in Quigley's location of the Red Top Lode Claim."

### XXII.

The court erred in instructing the jury as is contained in instruction No. 39 of the court's instructions to the jury, which is as follows:

"You are further instructed that prospectors and

locators of mining claims in Alaska, who are generally neither surveyors nor lawyers, in locating upon the unsurveyed mineral lands, frequently locate claims which are in excess in area of the amount allowed by law, and that unless the excess is unreasonably large, the location is valid. The excess, that is to say the amount over twenty acres, in a single placer claim, can be located by any person without the consent of the placer claimant, providing such excess is taken from the end farthest away from the initial stake. You are further instructed that the locator may also voluntarily cast off the excess, or any part thereof, from his claim; and if you find, from a preponderance of the evidence, that, prior to the entry of defendants upon the Hillside Bench Placer Claim as claimed by the plaintiff, the plaintiff did cast off, by agreement, expressed or implied, with one J. B. Quigley, any portion of plaintiff's placer claim as originally located and claimed, or if you find, from a preponderance of the evidence, that said Quigley made a valid location of his Red Top Lode Claim, partly within the boundaries of and covering a part of plaintiff's placer claim, and that plaintiff either acquiesced in or did not object to the act of Quigley, or to said Quigley's location of said Red Top Lode Claim, then such part thereof as was either so cast off by plaintiff, or included in said Quigley's location with the consent or acquiescence of plaintiff, could not thereafter be deemed to be a part of plaintiff's placer location; provided, however, that you find from a preponderance of the evidence that at the time of entry of defendants upon the said



Hillside Bench Placer Claim, the same was a valid placer mining location of plaintiff's".

### XXIII.

The court erred in instructing the jury as is contained in instruction No. 40 of the court's instructions to the jury, which is as follows:

"You are further instructed that if you find from a preponderance of the evidence that one J. B. Quigley, prior to the discovery and location of defendants of the Silver King Mining Lode as claimed by them, made a valid quartz location known as the Red Top Lode Claim, partly within the boundaries of plaintiff's placer mining claim, with the consent of plaintiff, or that the said plaintiff either acquiesced in or did not object to said Quigley's location of said Red Top Lode Claim, that then the portion of said Quigley's Red Top Lode claim lying within the boundaries of plaintiff's placer claim as originally located, could not thereafter be deemed to be any part of plaintiff's said placer claim, and that these facts, if you find by the preponderance of testimony that such facts exist, may be taken into consideration by you in determining whether the vein or lode located by defendants was, or was not, a known vein within the limits of plaintiff's placer claim, before or at the time, defendants discovered and located the Silver King Lode Mining Claim, as claimed by them; provided however, that you find from a preponderance of the evidence that, at the time of defendants' discovery and location, plaintiff was the owner of a valid placer mining claim, known



as the Hillside Bench Placer Mining Claim."

#### XXIV.

The court erred in instructing the jury as is contained in instruction No. 42 of the court's instructions to the jury, which is as follows:

"You are instructed that if you find and believe from a preponderance of all the evidence in the case that the plaintiff, William Grant, made a valid location of the Hillside Bench Placer Claim, as claimed by him, which he completed on the 20th day of April, 1920, and that in said year, or prior to July 1, 1921, he performed annual assessment work thereon, as required by law, to the extent of at least \$100.00, and if you further find from the preponderance of evidence that the lode or vein containing rock in place, thereafter discovered on the 6th day of June, 1921, by the defendants, was theretofore unknown and not known to exist within the boundaries of said Hillside Bench Placer Claim as reduced in area following Quigley's location, if you find from a preponderance of the evidence it was so reduced in area, then I instruct you that at the time of the entry of the defendants upon said Hillside Bench Placer Claim to prospect for said unknown lode, they, the defendants, could not initiate any right or title to said lode, as against the plaintiff, Grant, and you should return a verdict for the plaintiff.

You are further instructed, however, that if you find from a preponderance of evidence that the lode so discovered by the defendants was, at the time of the entry of defendants thereon, a known

lode, known to exist within the boundaries of the plaintiff's Hillside Bench Placer Claim as reduced in area, as aforesaid, by the Quigley location of the Red Top Lode Claim, then and in that case, even though the plaintiff Grant, had then and theretofore a valid prior placer location, known as the Hillside Bench Placer Claim, within the boundaries of which, as reduced in area following the aforesaid Quigley location, said known lode existed, the defendants herein had a legal right to locate said lode under the laws of the United States and of this Territory, and if you find from a preponderance of the evidence that they did so locate said lode substantially in the manner prescribed by law, as heretofore given to you in these instructions, or that they had made no valid location thereof, but were actually in possession thereof at the time of the commencement of this action, you should find for the defendants.

You are further instructed that possession which is actual and notorious would prevail against one who has neither title or possession."

#### XXV.

The court erred in rendering and entering a judgment in favor of the plaintiff and against the defendants to the effect that the plaintiff is the owner in fee as to all persons, save and except the United States, in and to the property described in the complaint in this action and that the defendants herein have no estate, right, title or interest therein.

#### XXVI.

The court erred in making and entering judg-

ment in favor of the plaintiff and against the defendants to the effect that the plaintiff recover his costs and disbursements herein.

WHEREFORE, the defendants pray that the judgment in the above entitled action may be reversed and that they be restored to all things which they have lost thereby.

R. F. ROTH.

Attorney for Defendants.

Service by copy accepted Sept. 7th, 1922.

MORTON E. STEVENS

Attorney for Plaintiff.

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922, Rob't W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

### **Petition for Writ of Error**

WILLIAM J. CAMPBELL and J. L. Tobin, defendants in the above entitled cause, feeling themselves aggrieved by the verdict of the jury and the judgment made and entered in the above entitled court and cause on the 20th day of March, 1922, come now, by R. F. Roth, their attorney, and petition said court for an order allowing said defendants to prosecute a writ of error to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of

security which the defendants shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of such writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

R. F. ROTH.

Attorney for Defendants.

Service of the foregoing petition for writ of error admitted by copy at Fairbanks, Alaska, this the 7th day of Sept. 1922.

MORTON E. STEVENS

Attorney for Plaintiff

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922, Rob't W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

**Writ of Error.**

United States of America: ss.

The President of the United States of America, To the Honorable Cecil H. Clegg, Judge of the United States District Court for the Fourth Division of the Territory of Alaska.

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the Fourth Division of



the Territory of Alaska, before you, and between William Grant, plaintiff, and William J. Campbell and J. L. Tobin, defendants, a manifest error has happened to the great prejudice and damage of said defendants, William J. Campbell and J. L. Tobin, as is said and appears by the petition herein;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said circuit on the 1st day of April, 1923, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS THE HONORABLE WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 7th day of September, 1922.

ATTEST my hand and the seal of the United States District Court for the District of Alaska, Fourth Division, at the Clerk's office at Fairbanks, Alaska, on this 7th day of September, 1922.

(Court Seal)

ROB'T. W. TAYLOR,  
Clerk of the District Court for the Fourth division



of the Territory of Alaska.

ALLOWED this 7th day of September, 1922.

CECIL H. CLEGG

Judge of the District Court for the Fourth Division, Territory of Alaska.

Service of the within and foregoing writ of error, by receipt of copy thereof, is hereby admitted at Fairbanks, Alaska, this 7th day of Sept. 1922.

MORTON E. STEVENS, Attorney for Plaintiff.

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922, Rob't. W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

**Order Allowing Writ of Error, Etc.**

On motion of R. F. Roth, attorney for defendants, and the filing of a petition for a writ of error and an assignment of errors,

IT IS ORDERED that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, and the judgment hertofore entered herein, and that the amount of bond on said writ of error be and hereby is, fixed at \$1,000.00.

CECIL H. CLEGG.

District Judge

Entered in Court Journal No. 15 page 512.

Service of a true copy of the foregoing order is here-

by accepted this 7th day of Sept. 1922.

MORTON E. STEVENS

Attorney for Plaintiff

Indorsed:

Filed in the District Court, Territory of Alaska,  
4th Div. Sep. 7, 1922, Rob't W. Taylor, Clerk, by  
R. H. Geoghegan, Deputy.

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(Title of Court and Cause)

**Citation on Writ of Error**

UNITED STATES OF AMERICA ss.

The President of the United States: To William  
Grant, and to Morton E. Stevens, his attorney.

GREETING:

You are hereby cited and admonished to appear  
at the United States Circuit Court of Appeals for  
the Ninth Circuit, to be held at the City of San Fran-  
cisco, in the State of California, on or before April  
1st, 1923, pursuant to a writ of error filed in the  
Clerk's office of the District Court of the Fourth  
Division of the Territory of Alaska, wherein Wil-  
liam Grant is defendant in error and William J  
Campbell and J. L. Tobin are plaintiffs in error,  
to show cause, if any there be, why the judgment  
in said writ of error mentioned should not be cor-  
rected and speedy justice should not be done to the  
parties in error in that behalf.

WITNESS the Honorable William H. Taft, Chief  
Justice of the Supreme Court of the United States  
of America, this 7th day of September, 1922, and

the independency of the United States the one hundred and forty-sixth.

CECIL H. CLEGG

District Judge. Presiding in the District Court for the Fourth Division of the District of Alaska.

Service of the foregoing citation is hereby admitted by receipt of copy thereof this 7th day of Sept. 1922.

MORTON E. STEVENS

Attorney for Plaintiff

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922. ROBT W. TALOR, Clerk,  
By R. H. Geoghegan, Deputy.

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(Title of Court and Cause.)

### **Order Extending Time to Perfect Appeal**

On this 7th day of September, 1922, the above entitled cause came on to be heard before the judge in the above entitled court upon a stipulation of the parties herein for an order extending the return day and the parties appearing by their respective attorneys, and it appearing to the court that it is necessary owing to the great distance from Fairbanks to San Francisco, California, and the slow and uncertain communication, between said points, that an order extending the time in which to docket said cause and to file the record therein by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, should be extended until the 1st day of April, 1923, and the parties hereto having

stipulated to the same,

Now, then, the court being fully advised in the premises and deeming that good cause exists therefor,

IT IS HEREBY ORDERED that the time within which said appellant shall perfect said cause on appeal be and the same is hereby enlarged to extend to and including the 1st day of April, 1923.

CECIL H. CLEGG

District Judge

Entered in court journal No. 15 page 512.

Indorsed:

Filed in the District Court, Territory of Alaska, 4th Div. Sep. 7, 1922 Rob't. W. Taylor, Clerk, by R. H. Geoghegan, Deputy.

**Certificate of Clerk of U. S. District Court to  
Transcript of Record**

United States of America,

Territory of Alaska, Fourth Division,—ss.

I, Rob't W. Taylor, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 723 pages, numbered from 1 to 723, inclusive, constitutes a full, true and correct transcript of the record on Writ of Error in cause No. 2528, entitled, William Grant, Plaintiff, vs. Wm. J. Campbell and J. L. Tobin, Defendants, wherein Wm. J. Campbell and J. L. Tobin are Plaintiffs in Error, and William Grant is Defendant in Error, and was made pursuant to and in accordance with the Praecept of the Defendants and Plaintiffs in Error, filed in this action and made a part of this Transcript, and by virtue of the Writ of Error and Citation issued in said cause, and is the return thereof in accordance therewith.

And I do further certify that the Index thereof, consisting of pages numbered i to iv is a correct index of said Transcript of Record; also that the costs of preparing said transcript and this certificate, amounting to Two Hundred Fifty-two & 20-100 Dollars (\$252.20), has been paid to me by counsel for Plaintiffs in Error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 24th day of October, A. D. 1922.

(Seal)

ROB'T. W. TAYLOR

Clerk of the District Court, Territory of Alaska,  
Fourth Division.





United States  
?  
Circuit Court of Appeals  
For the Ninth Circuit.

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WILLIAM J. CAMPBELL and J. L. TOBIN,  
Plaintiffs in Error,  
vs.  
WILLIAM GRANT,  
Defendant in Error.

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BRIEF OF PLAINTIFFS IN ERROR.

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Upon Writ of Error to the United States District Court for the  
Territory of Alaska, Fourth Division.

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R. F. ROTH,  
Attorney for Plaintiffs in Error.  
MORTON E. STEVENS,  
Attorney for Defendant in Error.

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No. 4001.

**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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**WILLIAM J. CAMPBELL and J. L. TOBIN,**  
Plaintiffs in Error,  
vs.

**WILLIAM GRANT,**  
Defendant in Error.

**Points and Authorities of Appellants Statement of  
Facts.**

In the month of April, 1920, the appellee, William Grant, attempted to locate a placer mining claim in the Kantishna Precinct, Fourth Division, Alaska, which he named "Hill Bench Claim," containing 20 acres, more or less, by setting two stakes on the northerly side and adopting two stakes of the Horseshoe Placer Claim on the southerly side, and by recording a notice of location in the following words and figures:

"Notice of Location of Placer Claim.

Notice is hereby given that I, Wm. Grant, have discovered placer gold within the limits of this claim

and have this day posted this notice of location at the point of discovery. I claim 1320 feet in length by 660 feet in width as marked on the ground for placer mining purposes. This claim shall be known as Placer Mining Claim, Hill Bench, opposite and on the east side of Horseshoe Placer Mining Claim on the right limit of Moose Creek, Kantishna Precinct, Territory of Alaska. Discovery made Sept. 10, 1919. Location notice Posted April 1920.

WM. GRANT,  
Locator.

Witness:

J. HAMILTON."

which said notice was immediately recorded in the recorder's office of the said Kantishna Precinct. (Trans., p. 77.)

That thereafter, prior to the 7th day of August, 1920, one J. B. Quigley entered upon the superficial area of said Hill Bench Placer Mining Claim, as shown by his notice of location (Trans., p. 196), sunk four holes to bedrock (Trans., pp. 201-2), discovered a lode of mineral bearing rock on the ledge right in line and drove a tunnel on the ledge a little more than 240 feet (Trans., p. 202).

Three shafts were sunk opening the ledge by Quigley before he sunk the shaft that he designated as his discovery shaft and before he staked the Red Top or made a notice of location (Trans., pp. 478, 479, 480), and as shown by the two plats on file, marked Plaintiff's Exhibit "A" and Defendants' Exhibit "2," from which it appears that J. B. Quigley discovered this vein of quartz inside of the exterior boundaries of the Hill Bench Placer Claim



in two separate places before he made any attempt whatever to locate the Red Top Lode Claim. All the testimony on the point is to that effect, and there is no contention to the contrary that William Grant knew of Quigley's prospecting for quartz and it is admitted expressly that Quigley's location of his Red Top Lode Claim was at all times a valid location, and Quigley had his tunnel on the lead and at least three shafts on the lead making a straight line, as shown by all of the testimony and especially by the two plats on file.

Campbell and Tobin taking a line of different points of discovery made by Quigley started to sink a hole twenty-five feet below the end line of Quigley's Red Top Lode Claim, and sunk a distance of forty-eight feet into a vein of mineral bearing rock in place (Trans., pp. 421-2-3), and after making such discovery staked a lode claim calling it Silver King Lode Mining Claim (Trans., pp. 205-6). After which plaintiff, William Grant, staked a claim over the defendants, Campbell and Tobin, taking Campbell and Tobin's discovery at the bottom of their shaft as the discovery for his lode claim, calling his lode claim the Hillside Quartz Claim, claiming that he made his discovery July 25th, 1921, and recording his notice of location thereof on the 26th day of July, 1921 (Trans., p. 124).

Grant also claimed that he based his discovery upon the fact that the vein that he saw in the defendants' shaft was a known lead, and his testimony is as follows on that point (Trans., p. 145).

“Q. What did you base that discovery on?

A. I based it on what I found on the dump and also on a known lead.

Q. How did you know that it was a known lead?

A. I knew it was a known lead by all reports.

Q. By all reports?

A. Yes.

Q. It was commonly known?

A. Yes, sir.

Q. It was commonly known to be a quartz lode and also it *shoed* on the Dump? You knew it for some time? A. Yes, for some time.”

It is conceded that defendants entered upon the ground peaceably and commenced the work of sinking their discovery shaft without any interference by the owner of the alleged placer claim, and that they continued their work of sinking the shaft to the depth of forty feet where they struck the vein and continued into the vein a depth of eight feet before there was any interference by any one, or any intimation that any one would object, but on the other hand the plaintiff claims that he was away from the claim a distance of thirty miles at Roosevelt, and did not know that defendants were working on his placer claim.

Plaintiff brought an action in ejection, claiming ownership by virtue of a placer mining claim, and also by virtue of a subsequent lode claim. Defendants denied plaintiff's ownership.

That after defendants had made their discovery in their shaft, as aforesaid, J. L. Tobin, one of the defendants, testified that on the 16th day of June,

1921, he saw William Grant, the plaintiff, at Roosevelt, and that during the conversation Grant said to him

“I heard you struck it pretty good,”—or rich, I wouldn’t be sure about the exact word—I says, “We have a good prospect” and he says, “I understand you sunk in one of my holes.”

Q. What did you say?

A. I said, “No, I did not.”

Q. Was there anything else said?

A. Nothing concerning this ground—we talked about the neighbors and others—Mr. Miller stood by.” (Trans., pp. 423–4)

Grant, the plaintiff, saw the defendants, Campbell and Tobin, about the 23d of June on the Silver King Lode Claim, but did not serve any notice upon defendants or make any complaint about their being in possession of any part of his placer claim (Trans., p. 425).

The first time that William Grant, the plaintiff, said anything to the defendants that would show that he objected to their being on the Hillside Bench Placer Mining Claim was on the 3d day of July, 1921 (Trans., pp. 426–7), so that the first objection made by Grant to these defendants was after they had sunk their hole to a depth of at least forty feet, had timbered it and had made a valuable discovery.

On these facts defendants, plaintiffs in error, Campbell and Tobin, contend that the lode which they discovered, and which they named the Silver King Lode was a well-known lode within the exterior boundaries of the placer claim claimed by plaintiff, as the same had been discovered and opened

by Quigley within the exterior boundaries of said Hillside Bench Placer Claim, and that Quigley's discovery was known by the plaintiff, Grant, and that Grant was aware of Quigley's prospecting there before Quigley staked the Red Top Lode Claim, and that Quigley, by his opening up this lode within the boundaries of the Hillside Bench Placer Claim, made it a known lode within that placer, and that the subsequent staking by Quigley of his Red Top Lode Claim could not change the lode within the boundaries of the placer claim from a known lode to an unknown lode. Having once been a well known lode within the boundaries of the placer claim it necessarily remained a well known lode therein.

Plaintiffs in error also contend that their peaceable entry on to the ground in question, and their working openly and in good faith by the sinking and timbering of a shaft, and discovering a vein of valuable ore in place, and their subsequently staking and locating and recording their claim according to law, made their location valid even though the placer claim had been validly located.

Plaintiffs in error contend that the alleged Hillside Bench Placer Claim was not properly located, and that a proper certificate of location was not recorded. The Session Laws of Alaska for 1915 covers the law completely with reference to the location of a placer mining claim in Alaska, and is contained in chapter 10 commencing at page 11. Sec. 1 of said Act provides

“He shall distinctly mark the location on the ground so that its boundaries can be readily



traced, by placing at each corner or angle thereof substantial stakes, or posts, not less than three feet high above the ground and three inches in diameter, hewed on four sides; or by placing at each corner or angle thereof mounds of earth or rock not less than three feet high and three feet in diameter and the stakes, post or monuments so used must be marked with the name or number of the claim and the designation, by number, of the corner or angle. The initial stake or monument, shall be one of the corner stakes, posts or monuments of the claim located.”

This provision was not complied with.

Commencing on page 148 of the transcript William Grant, the plaintiff below, testified as follows:

“Q. When you came to staking your placer claim, did you put a stake of your own at your initial corner?

A. No, sir.

Q. What was it you wrote on the initial corner post?

A. What I recorded, with the exception of the date.

Q. I am talking about the placer claim.

A. I am talking about the placer, too.

Q. You put on that corner post just what was on the notice of location?

A. With the exception of the date.

Q. And you copied—in order to make that notice of location, you copied off of your original notice of location stake?

A. Yes, sir.



Q. You put everything there on the stake in that notice?

A. I think I did.

Q. You copied it and that was your purpose?

A. Yes, sir."

This notice of location is Plaintiff's Exhibit "B," and will be found on page 77 of the transcript, and is hereinbefore set forth in full.

From this it is apparent that the second subdivision of section one of the Alaska Act above quoted was not complied with in that at least the initial stake was not numbered, and it is quite apparent from the reading of that notice that none of the stakes were numbered, and this being a plain provision of the Alaska Legislature, and a reasonable one, and being absolutely mandatory, and not having been complied with the claim never was properly located, and for that reason was at all times public domain open for location.

Also the certificate of location as recorded, being the same notice hereinbefore set forth, does not comply with the plain terms of section 2 of said Act of the Alaska Legislature. Subdivision (e) of said section 2 provides

"It shall set forth the description with reference to some natural object, permanent monument, or well known mining claim, together with a description of the boundaries thereof so far as applied to the numbering of stakes or monuments."

Said section further provides

"A failure to record a certificate of location of claim as herein provided shall operate as and

be deemed abandonment thereof, and the ground so located shall be open to re-location"; Sec. 9 on page 15 of said Act provides

"That any placer mining claim located or attempted to be located in violation of any of the provisions of this Act, shall be null and void and revert to the public domain and may be located by any qualified locator as if no such prior attempt had been made."

The law has been so very well settled upon the proposition of the validity of an Act of the Legislature with reference to notices of location and the certificates of such location to be recorded that it would seem superfluous to quote extensively from the authorities. We will therefore only name some of the authorities without comment.

Lockhart v. Johnson, 181 U. S., p. 516, 45 L. Ed. p. 979;

The question of the validity of the state statute was one of the main questions decided in this case, but there is no reference to it in its syllabus and the decision on this point commences on page 526 of the U. S. and on page 984 of the law edition;

Ehrhardt v. Board, 113 U. S., p. 527, 28 L. Ed., p. 1113; Butte City Water Co. v. Baker, 196 U. S., p. 119, 49 L. Ed. 409;

O'Donnell v. Ferrum Min. Co., 197 U. S. 343, 49 L. Ed. 784. This case is exactly in point upholding Butte City Water Co. v. Baker, 49 L. Ed. 409, but there is nothing in the syllabus bearing on the point.

Purdum v. Laddin, 59 Pac., p. 153; Hahn v. James, 73 Pac., p. 965; Dolan v. Passmore, 85

Pac., p. 1034; Hellena Gold & Iron Co. v. Baggaley, 87 Pac., p. 455; Deeney v. Mineral Co., 67 Pac., p. 724.

Discovery of a valuable lode had been made inside of the exterior boundaries of the Hillside Bench Placer Claim by J. B. Quigley, and after sinking several holes on to the lode he claimed the last hole that he sunk as his discovery, as will be seen plats, Plaintiff's Exhibit "A" and Defendants' Exhibit 2, and then located a lode claim, the boundaries of which extended into this placer claim, thus leaving a period of time after the discovery of the lode inside of the placer before such discovery was segregated from the placer claim by the location of the quartz claim, and, of course, we contend and maintain that in any event the discovery of this vein within the exterior boundaries of the placer claim by Quigley, and the location of his Red Top Claim, which is recognized to be valid by the defendant in error, made this lode a known lode within the exterior boundaries of the placer claim and rendered it the subject of location by any one who saw fit to locate it, more especially if the locator entered peaceably, openly and notoriously, and went to work sinking a shaft and continued for a period of about thirty days sinking and timbering, and as a result of his enterprise and energy discovered a lode of valuable mineral; that the placer claimant, who remained away from the ground and thus permits some one else to go to the expense and perform the labor required to develop a valuable lode claim will certainly not be permitted to take the benefit

of such labor and expense, and would not be permitted to say, under the circumstances, that he did not consent to such work being done.

But this was manifestly a known lode as it had been opened in at least four places in a straight line down to and into this placer claim, and the placer claimant himself, William Grant, recognized it as a known lode (Trans., p. 145), and this was on the 3d day of November, 1920, the year before the entry of Campbell and Tobin (Trans., p. 210). The placer claimant himself (Trans., p. 145) testified that he based his discovery of his lode, which was the discovery of the plaintiffs in error, on what he found in their dump, and also on the fact that it was a known lode that was commonly known to be a quartz lode, and he testified (Trans., p. 92).

“Q. And what did you say in regard to the lining up from Quigley’s discovery?

A. I told O. M. Grant when he was doing the assessment for placer, he might as well line up with Quigley and he might strike the lead there.”

### **Testimony of O. M. Grant.**

O. M. GRANT, the man who did the assessment work for William Grant, concerning the place where he started to do the assessment work on the placer claim, testified (Trans., p. 215.)

“Q. What did you and Billy Grant do, if anything, with regard to finding a place to do this assessment?

A. Billy looked around and I asked him where to go to work, and he examined and



looked around and said, "Anywhere here—about 25 ft. from the line—make a hole." He went back up again and I think stepped the ground and I sank right here. (Indicating.)

Q. Did he use anything to measure with?

A. No, I don't think so.

Q. You used a shovel to measure with afterwards, didn't you?

A. Yes, 25 ft. I measured down from the center end post.

Q. You measured from the center end post of Quigley's straight down hill?

A. No, I went 25 ft. straight down and about 7 ft. or 6 ft. up stream from the strike of the post.

Q. By the 'strike of the post' you mean straight down? A. Yes.

Q. You went about 6 ft.? A. 6 ft. or 7 ft.

Q. Towards the up stream from Moose?

A. Yes.

Q. Why did you do that?

A. He lined up the ledge.

Q. Who? A. Billy Grant and I.

Q. Did you figure the ledge dipped towards the up stream?

A. He looked up at Quigley's holes—up where they were sunk—and he said about here would be in line with the ledge if it runs through here, and he said to sink on that.

Q. State any and all things you and Billy spoke of with reference to where you wanted to do the work.



A. After he had measured down and agreed where to sink the first hole, he says, "Sink about here, and if you find any float or indications of quartz, tell me, and try to get to bed rock and the lead of Quigley's. You may get some placer too." He said, "A little below is where I made my discovery. Sink around and you may get something if you get to bedrock." That was the substance of our talk.

Q. That was the substance of about all of your talk? A. Yes, sir.

Q. Did you have any arrangements with Billy Grant as to what might happen in the event you should strike a quartz lead?

A. None whatever. He just told me to let him know and I said yes I would.

Q. You were not sinking there to find a vein that you hoped to have any interest in?

A. No, sir."

There can be no question as to the right of anyone to enter peaceably upon a valid placer claim and locate a known lode (Vol. 2 Lindley on Mines, 3d Ed., Secs. 413-4); Morrison's Mining Rights, 15th Ed., p. 280 et seq.

Upon this question as to whether the lode in question was a known lode plaintiffs in error called one John A. Davis, a mining engineer, by whom plaintiffs in error expected to prove that in September, 1921, he investigated the lode or vein which runs through the Red Top Lode Claim of J. B. Quigley, and that he traced the same ledge across Moose Creek for a distance of about half a mile from the

Quigley tunnel in a southwesterly direction from the same, and that the strike as shown crossed the discovery shaft of these defendants, and that the ore taken from the discovery shaft of the defendants is the same in character and appearance as the ore taken from the lode on the Red Top Claim, and that across Moose Creek in a southwesterly direction from the tunnel of J. B. Quigley on the Red Top Lode, in a straight line, a lode was found by John Hamilton and lessees similar, and containing ore similar, to that on the Red Top Lode Claim (Trans., p. 476), but the said witness Davis asked permission to address the Court, and to be excused from testifying on the ground that employees of the Bureau of Mines are instructed, by the Secretary of the Interior of the Federal Government, to ask the right of exemption from testimony, as a protection of the Government's interests, and the Court (Trans., p. 475) in response stated:

“I feel frank to say that it would be causing undue embarrassment to the office of the Bureau of Mines to require any of them to testify as to any knowledge gained by them with reference to any question in controversy in this case. It would tend very greatly to lessen their usefulness as officers in that Bureau, and for that reason the testimony of this witness will be excluded, if it is for the purpose stated by counsel.”

Then counsel for plaintiffs in error made their offer as above stated, and the Court ruled that Mr. Davis need not testify.

We know of no authority that would exempt an officer of the Bureau of Mines from testifying, especially when it was stated, as in this case, that he would be asked nothing about any matter confidentially obtained, or that could not be given without violating a confidence of any kind or character (Trans., p. 474).

J. B. QUIGLEY testified to the same things that plaintiffs in error expected to prove by John A. Davis (Trans., pp. 481-2-3-4).

Plaintiffs in error having entered upon the ground in question peaceably, quietly, openly and notoriously, and without interference, their discovery of a lode, as a result of such labor, gave them the right to locate a valid lode claim, even if the lode had been an unknown lode prior thereto.

The only authority upon which the Court below gave the instructions upon this point adverse to the contention of plaintiffs in error is the case of Clipper Co. vs. Eli Co., 194 U. S. 220, 48 L. Ed. 944, which is the case that has thrown confusion into the subject of the location of lode claims within the superficial area of placer locations.

We contend that the decision of this case, to the effect that the location of a lode claim within the boundaries of a prior valid placer location against the will of the placer locator is void, was inadvertant, not necessary and not embraced within the issues of that case, for this reason: At the time of the attempted location of the lode claims in question patent for the placer had already been applied for and under all of the authorities it is conceded that

the question as to whether or not there is a known or unknown lode is determined at the time of application for patent, and also that title to all lodes that are not known to exist within the exterior boundaries of the placer claim pass at the time of application for patent, consequently any subsequent discovery of a lode would be a discovery of a lode, title to which has already passed to the applicant for patent, subject, of course, to this title being defeated subsequently. The facts in the Clipper case are that the Searl Placer Mining Claim was located on the 12th day of December, 1877, and on the 5th day of July, 1878, the locators applied for a patent. This application for patent was held up but never finally disposed of, and subsequently the Searl Placer was held to be a valid placer, consequently the rights of the placer claimants to unknown lodes would relate back to the time when they applied for patent.

This is clear because their claim was subsequently determined to be a valid placer claim; hence they would be, under the law, entitled to procure a patent if the requisite work had been done, therefore, their claim being a valid claim, according to the decision of the Colorado Court, it is clear that they would be entitled to the benefit of their prior application for a patent, and that the status of a lode, that is to say, if it were a known or unknown lode, would be determined as of the date of their application for the patent.

This will be made very clear by referring to the original case decided by the Supreme Court of



Colorado and reported in the 68th Pac., page 286. There was a petition for rehearing and the appellants in that petition contending very strenuously against the position apparently taken by the Court as to the rights of a person to locate a lode upon a placer prior to application for patent, the Court, on page 290 says:

“The defendant alleged, and the plaintiffs denied, that the lode claims were known to exist before application for a placer patent. The findings were that the locators of the lode claim had not the right to go upon the territory included within the placer location for the purpose of prospecting and locating lodes. Possibly we have not hitherto made sufficiently prominent the fact that a patent for the placer was applied for long before an attempt was made to locate the lode claims,—the original application in the year 1878 or 1879, the exact date being immaterial. An amended application was made in the year 1882, which was rejected by the secretary of interior in November, 1890, and it was not until after this last date that the locators of the lode claims made an entry upon the placer location.” \* \* \*

“At all events, the application for a placer patent was made 11 or 12 years before the alleged right to the lode claims was initiated. Before it can be said that a lode is known to exist, there must be actual knowledge, as distinguished from supposition or surmise. *Sullivan v. Mining Co.*, 143 U. S. 431, 12 Sup. Ct.



555, 36 L. Ed. 214. And, in order to uphold the judgment, we shall assume, as very properly we may, that the trial court, as a matter of fact, found that the lodes were not known to exist until after the application for a patent was made. Indeed, we do not see what other finding could possibly be made when it is considered that the locators of the lode claims did not enter upon the placer claim to prospect until years after its owners had applied for a patent. And for aught that appears to the contrary—which is the contention of the defendants in error—the lodes may have been discovered and their existence thus first become known only by sinking a shaft to a depth of several hundred feet beneath the surface, and that the entry by the lode locators was forcible and against the will of the placer claimant.”

The Supreme Court of the United States in its decision affirming this case, *Clipper M. Co. vs. Eli M. Co.*, 194 U. S., p. 220, 4 L. Ed. 944, in the very opening paragraph states:

“The location of the placer mining claim and both the original and amended applications for patent thereof were long prior to the locations of the lode claims, and the contention of the plaintiffs is that they, by virtue of their location, became entitled to the exclusive possession of the surface ground; that the entry of the lode discoverers was tortious and could not create an adverse right, even though, by means of their entry and explorations they discovered

the lode claims. The defendant, on the other hand, contends that the original location of the placer claim was wrongful, for the reason that the ground included within it was not placer mining ground."

From this statement it is quite evident that the only question at issue in that case that can be in point here was as to whether or not the placer claim was a valid claim, for if it were a valid claim that would end the controversy absolutely because their application for a patent would be valid if the location were a valid location, and no right whatever could be instituted by the lode locators after the application for patent had been made.

The decisions by the Colorado Supreme Court and by the Supreme Court of the United States are manifestly right, but both of the Courts got off on to a dissertation as to the rights of a placer claimant before patent applied for, which was not at all in point, and was not necessary for the decision, and for that reason should have no binding effect upon the rights that might arise between a prior placer claimant and a subsequent lode claimant on the same area before patent applied for by a placer claimant.

Morrison in his work on mining rights 15th edition at page 286 says, speaking of the Clipper case:

"This practically gives all blind lodes to the placer owner and thereby defeats the intent of the Act of Congress. But it is within the limits of judicial construction and is therefore a binding authority to the extent of the decision."

Thus it will be seen that to as good an authority on mining law as Mr. Morrison this decision in the Clipper case, so far as it relates to the location of a lode on a placer claim before patent applied for by the placer claimant, defeats the intent of the Act of Congress, and there can be no doubt whatever but that it does defeat the Act of Congress if the decision goes to that extent, but it is equally clear that Mr. Morrison did not analyse the Clipper case as closely as the case warrants because it was not necessary to decide in the Clipper case that a valid entry could not be made upon a valid placer claim before patent applied for and a valid lode claim be thereby initiated without the consent of the placer claimant, because, as before stated, patent had been applied for by the placer claimant in the Clipper case before entry made by the lode claimant.

Mr. Lindley in his work on mines 3d Ed., Vol. 2, Sec. 413, page 961 says, concerning lodes within placers:

“That when so found they may be held by the same or different persons is well settled by both judicial and departmental decisions.”

Citing *Reynolds vs. Iron S. M. Co.*, 116 U. S. 687; *Aurora Lode vs. Bulger Hill Placer*, 23 L. D. 95.

In the same section on the same page the author says:

“There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former, there is a grant of the exclusive right of enjoyment of the surface and everything

within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface. No subsequent locator, either lode or placer, can invade such surface, though he may openly and peaceably enter for the purpose of laying his lines in such a manner as to properly define his extralateral right. On the other hand, lodes found with the placer surface, or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant. Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is to sever them from the body of the public lands, and to deal with them and the land immediately enclosing them as separate and distinct entities."

Continuing in the same section on page 962 he says:

"The placer claimant may, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation, unless the existence of the lode remains unknown until the application for a placer patent is filed."

Citing *Aurora Lode v. Bulger Hill Placer*, 23 L. D. 95.



Continuing the author says in the same paragraph:

“It is no objection to the validity of a placer location that it embraces veins or lodes as well as placer deposits, but the right to appropriate the lode must flow from the discovery of the lode. Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to claim it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; provided, always, that such appropriation is made and perfected peaceably and in good faith.”

Citing *McCarthy v. Speed*, 11 S. D. 362, 77 N. W. 590, 592; *Mt. Rosa M. M. & L. Co. v. Palmer*, 26 Colo. 56, 56 P. 176, and also the *Clipper* case above cited.

Continuing in the same section the author on page 965 says,

“If a placer claimant has abandoned his claim, or waived the trespass, or by his conduct is estopped from complaining of it, the subsequent lode location will be considered valid.”

Citing the *Clipper* case above quoted.

On page 966 of the same volume the author, drawing his conclusions from all of the statements made in this section (413), says:



“(1) A perfected placer location does not confer the right to the possession of veins, or lodes, which may be found to exist within the placer limits at any time prior to filing an application for a placer patent;

(2) Such lodes may be appropriated (a) by the placer claimant, or (b) by others, provided the appropriation is effected by peaceable methods and in good faith;

(3) Where a lode is known to exist within the limits of a placer location at any time prior to the placer application for patent, and is not claimed in the application as a lode, the title to such lode does not pass by the patent, but it may be located by anyone having the requisite qualifications, provided the location is made peaceably and in good faith.”

From the foregoing it will be seen that no case has been decided by any court against the subsequent lode claimant and against the prior lode claimant where the entry of the lode claimant was made peaceably and in good faith, and discovery of an unknown lode made prior to the application for patent by the placer claimant, and in the case at bar application has never been made for patent by the placer claimant.

The foregoing points cover completely assignments of error I, II, III, IV, V, VI, and VII.

The error complained of in the VIII assignment of error is well taken because the evidence, as heretofore set forth, that the claimant of the placer claim knew, for a considerable length of time, that

the defendants were working on the placer claim, and also that they had made a discovery, and he permitted them to continue to work without notifying them that he claimed the ground, and without notifying them to leave the ground.

The error complained of in the IX assignment of error is manifest because the Court instructed the jury in effect that the location of a placer mining claim was equivalent to a grant from the Government of an unknown lode within the boundaries of such placer claim, when, as a matter of fact, all lodes are excepted, and unknown lodes only pass when application for placer patent is made.

The X assignment of error is well taken because it instructs the jury that

“A substantial compliance with the laws governing the location of quartz and placer mining claims is all that the law requires.”

This is not the law except in certain particulars.

Where the law specifically provides that certain things must be done, such as marking the boundaries in a particular way when the statute provides for such marking and recording a particular certificate, those special requirements must be complied with.

Under instruction No. 20, assigned as error in this assignment, the jury might have well felt that even though the placer claimant failed to number the stakes, as required by law, and that he failed in the recorded certificate to describe the stakes with reference to their numbers, as is also the fact in this case, that it was still a substantial compliance

with the law, which is strictly erroneous, and contrary to all of the decisions heretofore cited on that point.

The error assigned in the XI assignment of errors is well taken because it states that

“When the controversy is between two mineral claimants, as in this case, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry.”

This was entirely misleading to the jury because while the plaintiff and defendants were mineral claimants yet they were claimants for different kinds of mineral claims, and the person claiming a placer claim, which he is not working as a placer claim but only holding by doing the annual work, and a person coming along and making a discovery of a valid lode claim, the placer claimant is in exactly the same category that he would be in if his controversy were against an agricultural claimant.

The rule stated in instruction No. 22, complained of in this assignment, would be correct law if the two mineral claimants were either both placer claimants or both lode claimants. The instruction, therefore, was clearly misleading, and gave the jury leeway to which they were not entitled.

The XII assignment of error is manifestly well taken because the Court in instruction No. 23 instructed the jury:

“Where there is a valid location of a mining claim, either quartz or placer, the area thereof

becomes segregated from the public domain and the property of the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location.”

This language is true as to a quartz location, but it is not true as to a placer location because a placer location is for the purpose of obtaining the right to mine for placer gold, and a valid quartz location may be made within the superficial area of the placer claim, and it is not true, as shown by the authorities heretofore cited, that the placer claimant, by virtue of his placer location, becomes the owner of an unknown lode within his claim prior to the date of his application for patent, as title to that lode absolutely remains in the Government whether it be known or unknown until patent is applied for and the application accepted by the Government on the placer location, and it follows, therefore, that the placer locator has absolutely no right to the possession of a lode within his claim prior to the date of his application for patent, but he may exclude all persons if he desires from entering upon the surface and prospecting, but if one does enter and prospect, either with or without his consent, and uncovers an unknown lode the same then becomes a known lode whether the discoverer of it is entitled to enjoy it or not, but it is clear that the owner of the placer claim cannot acquire title to a lode that is discovered within his placer claim before patent applied for, whether the same was rightly or wrongly discovered; therefore, the instruction is clearly wrong, because the placer claim-



ant is not the owner and has not the exclusive right of possession of any lode within his claim before he applies for patent, and this certainly misled the jury.

The XIII assignment of error is clearly a good assignment because the Court in instruction No. 34 says:

“The object of any notice or markings on the ground is to identify the claim, and to guide the subsequent locator, and to inform him as to the extent of the claim of the prior locator and whatever notice does this fairly and reasonably should be held to be a good notice.”

This in effect instructs the jury that they may disregard the law that refers to numbering the stakes of a claim, or as to the size of the stakes, or as to the recorded certificate, providing the jury may fairly and reasonably determine that the subsequent locator was informed as to the extent of the claim of the prior locator. This is contrary to all of the decisions which hold that a provision of a statute which requires a particular thing to be done must be done in order for the claim to be valid, regardless as to whether or not the subsequent locator may have accurate information as to the extent of the prior location.

The XIV assignment of error is well taken because instruction No. 25A complained of in said assignment tells the jury that a locator of a placer mining claim may disregard a plain provision of the statute, to wit:



“He shall distinctly mark the location on the ground so that its boundaries can be readily traced, by placing at each corner or angle thereof substantial stakes, or posts, not less than three feet high above the ground and three inches in diameter, hewed on four sides”; (Session Laws of Alaska 1915, p. 11).

This is an express provision of the statute and must be complied with, and there was no attempt on the part of the placer claimant to place stakes at two of the corners. He claims that he adopted two stakes belonging to an adjoining claim owner, which he was not authorized to do under the statute. This instruction No. 25A, is, therefore, clearly in conflict with the direct provisions of the statute herein cited.

The XV assignment of error concerns instruction No. 29, and this assignment is especially well founded because the Court instructed the jury that, in the case at bar, if the placer claim in question were a valid placer claim and the lode discovered by the lode claimant had been theretofore an unknown lode then the lode claim in question was void, taking the matter away from the jury entirely as to whether or not the placer claimant, by his conduct, had consented to the prospecting of the plaintiffs in error, and instructing the jury in effect that a placer claimant, who has initiated a valid placer claim, may, by doing the annual work, segregate that superficial area so that a valid lode claim could not be initiated within the superficial area thereof. In other words a man might locate

a placer claim on a hill, where valuable lodes had been discovered, and by making a discovery of a few colors of placer gold initiate a valid placer claim, and he could go to Europe, making provisions only to have the annual work done, until the prospectors determine absolutely that a valuable quartz claim can be found by digging within the superficial area of his placer claim, then go upon his ground and avail himself of this prospecting of other for quartz, and through the holding of a valueless placer claim, and through it alone, acquire a valuable lode claim. Such was not the intention of Congress, and we contend that it has never been so decided by any Court where that point was necessary to be decided.

And for the same reasons the XVI and XVII assignments of error are also well taken as the 30th and 33d instructions of the Court cover the same ground practically as the 29th instruction.

The XVIII assignment of error especially discloses error, as instruction No. 35, which is the subject of this assignment, in the first paragraph of which the Court gives the jury to understand that if any person shall locate a lode claim and post a notice, or files of record a location certificate, giving the date of discovery, that such notice or certificate is an admission on the part of the locator that the placer so discovered was prior thereto unknown. In other words the Court plainly told the jury that when a notice or certificate states the date of a discovery that it is the discovery of an unknown lode. Therefore, if the lode had been

exposed to view to the locator of the lode and to the whole world, and he should post a notice or record a certificate on which he claims a certain date for his *discovery* such certificate or notice makes it an unknown lode, which, of course, is not the law and misled the jury.

This first paragraph is absolutely inconsistent with the second paragraph of the same instruction, which says exactly the opposite, and the whole instruction could do nothing but confuse the jury.

The XIX assignment of error is error assigned to the last sentence of instruction No. 36, which instructs the jury:

“On the other hand if said location was upon an unknown lode within plaintiff’s said placer claim, they should find for the plaintiff.”

This excludes the possibility of a valid lode location upon an unknown lode within a placer mining claim.

The XX assignment of error, which refers to instruction No. 36, is error based upon that portion of the instruction which gives such importance to, and indeed makes it the one important fact in issue, as to whether or not the lode claimed by defendants was known to exist or was not known to exist within the then boundaries of plaintiff’s placer claim at the time defendants entered, thus telling the jury in effect that although J. B. Quigley had made a discovery of a lode within the exterior boundaries of the placer claim, and had afterwards taken that location into a lode claim that he lo-

cated, thus cutting off a portion of the placer claim, that a subsequent prospector for the same lode would be bound by the boundaries of the placer claim as fixed, not by the original locator of the placer claim, but by J. B. Quigley, who cut a part of it off containing the lode.

We contend that there is no authority, law, logic, or common sense that will support a proposition of that kind, and an attempt to make that the law is certainly making of a placer claim a sort of a sacred area, so that if a man locates a placer claim on the side of a hill that is showing up good for quartz and validates his placer by finding a few colors of placer gold he can prosecute a man for trespass who should find it necessary to even walk across his claim in order to get to his work to dig for his quartz lode. This was never intended and we don't think the Court will sustain any such decision, because there is no law for it and it is wrong.

The XXI assignment of error refers to instruction No. 38 and is assigned as error because, first, it is a statement of the fact upon which the following instructions were based, and, second, that the location of the Quigley Red Top Lode Claim was not in controversy in this action, and the reference to it simply tended to confuse the minds of the jury as to the real issues to be decided. This instruction No. 38 merely refers to the location of Quigley, and the segregation of Quigley by his location of a portion of the placer claim.



Assignment of error XXII is well founded because, following up instruction No. 38 the Court in instruction No. 39 expressly told the jury that if the placer claimant consented to Quigley's location that that would cut off that superficial area contained in Quigley's quartz claim from the placer claim, and said instruction also instructed the jury concerning the casting off, by the placer locator of a portion of the superficial area of his claim when there was no evidence upon which to base such instruction and tended only to confuse the jury.

The XXIII assignment of error concerns instruction No. 40, which instruction plainly tells the jury that if Quigley's location of his Red Top Lode Claim, which was apparently within the boundaries of plaintiff's placer claim was located by Quigley with the consent of the placer claimant, or that the placer claimant either acquiesced in or did not object to said Quigley's location, then that portion of the Quigley's Red Top Lode Claim lying within the boundaries of plaintiff's placer claim could not thereafter be deemed to be any part of the placer claim. Here the instruction states the law to be that if Quigley's entry upon the placer claim in question and his discovery thereon *done without the objection* of the placer claimant that his location was valid, whereas the Court instructed the jury stating that the entry of the plaintiffs in error, which was done without objection also was absolutely void and a trespass unless done with the express consent of the placer



claimant. Also this instruction goes farther and says that even though Quigley by his discovery of a lode of valuable mineral-bearing quartz within the superficial area of this placer claim and thereby making it a well-known lode within the placer claim that by the location of said lode by Quigley after its discovery in said placer, that this act of Quigley's segregated this portion of the lode from the placer claim and changed the status of the lode within the placer claim from a known lode to an unknown lode. There has been no law or authority cited to support a contention of this kind and we will venture the remark that it can only serve to deprive the prospectors, who have expended their time and labor in digging and timbering a shaft 48 feet, of the benefit of their valuable discovery by a man who has sat back and waited for them to make this discovery with the hope that he could swoop down upon it and locate a lode claim based upon this discovery, which was attempted to be done in this case, and which has so far been successful.

The XXIV assignment of error is to instruction No. 42, and the assignment is well taken for the reasons stated in the last three paragraphs.

We have not endeavored to reiterate the authorities when dealing with the assignments of error in particular because at the beginning of this brief we have set forth the authorities which touched upon, and are decisive of the issues raised, and, of course, we have cited no authorities upon the point as to whether or not a prospector who enters upon

the superficial area of a placer claim and digs and makes a discovery of a vein or lode containing valuable minerals, without either the objection or consent of the placer claimant, and afterwards locates a quartz claim which extends into the placer claim having the full width of 600 feet that such location of such lode will segregate that area from the placer claim and change the status of the lode so discovered inside of the placer claim from a known lode to an unknown lode. There are no authorities on this point so far as I have been able to find within our limited library in Fairbanks, and I do not believe that the question has ever been raised before, and I feel that such a contention is not based upon law or equity.

It is our contention that the lode in question considering the discovery of plaintiff in error was made on a known lode within the placer claim and that the discovery of this known lode was made by plaintiffs in error, peaceably, openly and notoriously, and in good faith, and that no objection of any kind had been made, until, by their efforts, they had uncovered, by their expense and labor, a lode containing valuable minerals, and that the attempt of the defendant in error to appropriate this discovery to himself by locating a lode claim over the lode claim of plaintiffs in error and claiming the discovery of plaintiffs in error as the discovery for his lode claim is ridiculous and preposterous and so inequitable that no Court would give validity to it unless compelled to do so by an in-

flexible law that would not permit them to do otherwise.

We therefore submit that the judgment should be reversed.

R. F. ROTH,  
Attorney for Plaintiffs in Error.

Due service of a typewritten copy of the foregoing brief admitted this 18th day of August, 1923.

MORTON E. STEVENS,  
Attorney for Defendant in Error.



IN THE *f*  
United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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WILLIAM J. CAMPBELL and J. W. TOBIN,  
Plaintiffs in Error,  
vs.

ARCHIE McINTYRE, as Administrator of the  
Estate of WILLIAM GRANT, Deceased,  
Defendant in Error.

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Upon Writ of Error to the District Court for  
Alaska, Division Number Four.

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**BRIEF FOR DEFENDANT IN ERROR.**

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MORTON E. STEVENS,  
Fairbanks, Alaska,  
Attorney for Defendant in Error.

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FILED

NOV 16 1923

F. D. MOKKTON,  
CLERK.





No. —.

IN THE

United States

# Circuit Court of Appeals

For the Ninth Circuit.

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WILLIAM J. CAMPBELL and J. W. TOBIN,  
Plaintiffs in Error,  
vs.

ARCHIE McINTYRE, as Administrator of the  
Estate of WILLIAM GRANT, Deceased,  
Defendant in Error.

Upon Writ of Error to the District Court for Alaska,  
Division Number Four.

## Brief for Defendant in Error.

### STATEMENT OF THE CASE BY DEFENDANT IN ERROR.

Numerous statements contained in the brief of plaintiffs in error, as to the facts of this case, not being justified by the evidence, and, particularly not by a preponderance of evidence, and, therefore, are contrary to the necessary findings of the jury, must be controverted by Defendant in Error. We, therefore, submit our statement of the case based upon the record herein.

This is an action brought by defendant in error, against plaintiffs in error, in ejectment, commonly known as an action to try title to mining property.

The complaint alleges the ownership and right of possession of placer claim known as Hill Bench Claim, containing twenty acres, adjoining and being east of the Horseshoe Placer claim, on the right limit of Moose Creek, Kantishna Precinct, Alaska. Plaintiff further alleges the ownership and right of possession to a quartz location known as Hill Side Lode Claim, located partly upon and running through said Hill Bench Placer Claim, as therein described. Said complaint alleges the wrongful possession of defendants.

The answer, after a denial of all material matters contained in the complaint, alleges title and possession in defendants of a quartz claim, known as Silver King Lode Mining Claim, based upon defendant's alleged location thereof, June 6, 1921 (which is prior to plaintiff's location of Hill Side Lode Claim). It is conceded that the two lode claims described in the pleadings cover the same discovery, vein or lode. The only substantial difference in the boundaries being that plaintiff's lode claim is 25 feet on either side of the center of the vein, in width, while defendant's claim is described as 300 feet on either side of the center of said vein.

William Grant, plaintiff below, 62 years of age, had been a miner for over 40 years. (Tr., pp. 51, 54.) On September 10, 1919, he entered upon the placer ground in controversy and in front of and near his present cabin he dug two or three holes and panned three pans of the contents thereof and found gold in all of them; one pan disclosed colors and the contents of the other two pans described

gold as "fairly good," "fairly coarse," and "fairly rough." At that time plaintiff knew that men had been placer mining on Moose Creek and on Friday Creek near by for many years. (Tr., pp. 55-60.) This prospector took these facts into consideration, including the character of the ground, its formation, the location with reference to other placer claims and the amount of gold found in said pans; stated that such a discovery would justify an ordinary prudent man expending further labor or money in developing the property for placer mining purposes. (Tr., p. 62.)

April 19, 1920, plaintiff below went back upon this ground, in company with John Hamilton and another. Hamilton owned the adjoining claim known as the Horseshoe Claim. They went to one of Hamilton's corner stakes, whereupon plaintiff below, after obtaining permission from Hamilton, adopted this stake as the initial stake of Mr. Grant. (Tr., pp. 64, 65.)

This stake extended about four feet above the ground and was four or five inches in diameter, squared on four sides. (Tr., p. 63.) Grant thereupon wrote upon the side of said stake towards his proposed placer claim, his name, William Grant: "April 19, 1920, I claim 1320 feet up Moose Creek to post No. 2 and 660 feet up hill." He wrote "Hill Side Bench Claim and corner No. 1." He wrote "initial stake of Hill Side Bench mining claim." (Tr., pp. 64-66.)

Mr. Grant then went up Moose Creek where Hamilton found another corner of his Horseshoe Claim

and thereupon adopted Hamilton's corner stake as Grant's corner stake No. 2. This stake was between three and four feet above the ground and over three inches in diameter, squared on four sides. (Tr., pp. 67, 68.) Grant wrote upon the uphill side of this stake, "stake No. 2, claiming 1320 feet down Moose Creek, 660 feet uphill, for placer mining purposes." Also "April 19, 1920." Plaintiff wrote upon said stake the name of the claim and his own name. On this stake No. 2 he marked two arrows, one pointing down Moose Creek and the other arrow pointing uphill. (Tr., pp. 68, 69.)

The next day, April 20, 1920, Grant established his corner post No. 4, the location thereof high up the hill from his initial post, and difficult to reach. This post No. 4 was over three feet above the ground and about six inches in diameter, squared on four sides. Upon this stake the locator wrote "Hill Side Bench Claim," date of location and his name, also wrote No. 4. This was on the lower or downhill side of the post. (Tr., pp. 70, 71.) Upon this post the locator marked the same with two arrows, one pointing down to the initial stake and the other pointing upstream towards post No. 3. (Tr., p. 72.) Mr. Grant then crawled alongside of the hill to a point where he established his post No. 3, where he tied the same to a bush. This post was over three feet above the ground and was three or four inches in diameter, squared, upon which the locator wrote "April 20, 1920, Northeast corner post Hill Side Bench Placer Mining Claim." He num-



bered the same as No. 3 and signed as William Grant locator. (Tr., pp. 73, 74.)

At this post, No. 3, the locator could see post No. 4 and post No. 2. (Tr., p. 73.) Standing at the initial post, No. 1, the other three corner stakes could be seen. Standing at corner post No. 2, the other three posts could be seen. Standing at corner post No. 3, corner posts Nos. 1 and 2 and 4 could be seen. Standing at corner post No. 4 all other corner posts could be seen. This was an open country, having no timber or brush to interfere with the view. (Tr., pp. 81, 82.) The Horseshoe placer claim owned by said Hamilton was a well-known location. (Tr., p. 78.)

July 12, 1920, Wm. Grant filed for record with the recorder of said Kantishna Precinct, Alaska, his location certificate, as set forth in the brief of plaintiffs in error. (Tr., pp. 77, 78.)

After this Hill Bench Placer Claim of plaintiff below was thus located and in the summer of 1920, one J. B. Quigley prospected the hillside upon which plaintiff's placer claim was situate. By sinking a shaft Quigley made a discovery upon a lode, which point of discovery is 170 feet and four inches uphill from and outside of the original boundary lines of said Hill Bench Claim. (Tr., pp. 20, 21.) Grant's placer location, as described on the stakes and certificate called for only 660 feet uphill from his initial post and 1,320 feet up Moose Creek, being twenty acres. The claim, however, as originally stated, was known to be too large.

(Tr., pp. 71, 88-91.) It contained as a matter of fact 23.664 acres. (Tr., p. 26.)

By reason of said discovery Mr. Quigley, August 7, 1920, located a quartz claim known as the Red Top Lode and filed his certificate of location September 15, 1920, with the recorder of said precinct. (Tr., pp. 196, 197.) The boundaries of the Red Top Lode Claim were properly marked upon the ground, claiming 1,500 feet in length and 600 feet in width. (Tr., p. 200.) Quigley started to build, and did build, his residence near Grant's westerly end line and on the line or very close to the line of Quigley's westerly side line of the Red Top. This residence was a little less than 660 feet above Grant's initial post and a little more than 136 feet below and downhill from Grant's northwesterly corner as originally staked (post No. 4). (Plffs. Ex. "A.") Quigley informed Grant that this place of residence was not on Grant's placer claim. (Tr., pp. 88-91.) This statement was accepted to be true and the conduct of these parties disclose the fact that Grant intended to cast off the excess, and that he did thereby cast off a portion of the excess, but that the claim was still too long and upon the basis of a line drawn from the lower end line at a point 660 feet above the initial post to corner No. 3 there still remained in said placer claim 21.65278 acres. (Tr., p. 26.) That after completion of said Quigley residence he built along the sidehill buildings known as the cache, bunk-house and blacksmith-shop. (Plffs. Ex. "A," Map.) (Defts. Ex. "2," Map.) (Tr., pp. 88, 89.)

The boundary lines of Quigley's Red Top Lode Claim, extended far into Grant's placer claim, as originally staked. The lower center end stake being 173 feet below the mouth of Quigley's tunnel, which tunnel entrance is 96 feet and ten inches below the upper side line of the placer claim, as originally staked, but which had been cast off by Grant. In other words, the lower end line of the Red Top Lode Claim, being entirely within the boundaries of the placer claim, and being 600 feet, more or less in length, was located, approximately 269 feet and ten inches below Grant's line, as originally staked. (Tr., pp. 20-22.) This Red Top location which was made without objection upon the part of Grant, and apparently by his consent, takes in the Quigley buildings (with the exception of a portion of the Quigley residence), and includes the mouth of Quigley's tunnel. (Tr., p. 30.) (Plffs. Ex. "A.") This Red Top location cuts out and segregates from the Grant placer location, the balance, and a little more, of the excess in area of the placer claim. It cuts out 3.7 acres. (Tr., pp. 627, 628.) The said lower end line of Quigley's Red Top Claim, by reason of the excess in area of the Bench Placer claim, and acquiescence in such location by Mr. Grant, became the dividing line between the placer claim and said Red Top Claim, and there remained to the placer claim about 20 acres, as originally intended.

There has been no prospecting and no discovery of any quartz or vein between the mouth of the Quigley tunnel and the lower end line of said

Red Top Claim, a distance of 173 feet. (Tr., pp. 92, 199, 202, 203, 221, 222, 444, 445.) No evidence was introduced disclosing or tending to show that any vein or lode was known to exist within the boundaries of Grant's Hill Bench Claim, as modified or changed by the casting off of the excess, by the location of said Red Top Claim. That no lode or vein was known to exist within 173 feet of said Bench Claim. (Tr., pp. 92, 199, 202, 203, 221, 222, 444, 445.)

Plaintiff below, in November, 1920, employed O. M. Grant to prospect and to do assessment work within the boundaries of his said placer location. O. M. Grant, in pursuance of said employment sank nine holes within the boundaries of said placer claim as it then existed. Said nine holes were all below the lower end line of said Red Top Lode Claim. (Plffs. Ex. "A.") (Tr., pp. 84, 85.) O. M. Grant sank the first hole at a point designated by plaintiff below. It was about 25 feet below the center end post of the Red Top Claim and 6 or 7 feet upstream therefrom. (Tr., pp. 215-83.) This hole was sunk by Grant to a depth of 12 feet in November, 1920. (Tr., pp. 217-84-85.) O. M. Grant, June 3, 1921, recognized this same hole and saw at said time defendants below, Campbell & Tobin, working there with a windlass over said hole which is designated on the map as Campbell & Tobin shaft. (Tr., pp. 217, 218.) At said time in June, 1921, the said O. M. Grant observed a fresh hole that looked as if it had been newly dug, located just to the right of the hole designated as the Camp-



bell & Tobin shaft: Which fresh appearing hole the said Grant had not made. (Tr., pp. 217-219.) There was no known lode or vein within the boundaries of Grant's said placer claim as amended by the casting off and location of said Red Top Claim. (Tr., pp. 221, 222-92.)

The defendant in error was absent from his said placer claim from the first of March to the 20th, of June, 1921. (Tr., p. 85.) That at the time plaintiffs in error Campbell and Tobin entered upon Grant's placer claim, which was between the 25th and 30th of May, 1921, Wm. Grant was at Roosevelt, sometimes called the Landing on the Kantishna River, which is about 30 miles from the property in dispute herein. (Tr., p. 97.) He was there engaged in resacking ore for shipment. (Tr., p. 103.) Wm. Grant did not, at any time, give the said Campbell or Tobin permission to enter upon said placer claim for any purpose, and that he did not know of their entering upon the ground until afterwards. (Tr., pp. 97, 98.)

After Wm. Grant had completed resacking ore at Roosevelt, and about June 25, 1921, he went to his placer claim in question and found said Campbell & Tobin working in shaft designated on the map as the Campbell & Tobin Shaft, the same shaft dug 12 feet by said O. M. Grant. (Tr., p. 104.) Said Wm. Grant then posted two trespass notices on the claim, stating that he was the owner of the property and giving the warning that trespassers would be prosecuted. (Tr., pp. 104, 105.) The next morning while on his road back to Roosevelt



with the mail he found that his trespass notices had been torn down. (Tr., pp. 106, 107.) That some time in July Grant returned to the claim, put up a tent on the property, and reposted the trespass notices upon the claim, and while doing so plaintiff in error Campbell threw two rocks at him and the third rock, the size of a man's fist, thrown by Campbell, struck said Grant in the small of the back and knocked him down. (Tr., pp. 107, 108, 109.)

Campbell & Tobin, defendants below, had discovered a vein or lode of quartz in place, at a depth of 40 feet from the surface, in the hole which plaintiff Grant had started and sunk 12 feet, and had, by reason of such discovery, pretended to locate said quartz lode on June 6, 1921. (Tr., pp. 6, 7-114.) The discovery made by Campbell & Tobin is agreed in the record to be sufficient. (Tr., pp. 113, 114.) Wm. Grant having seen the substance which came from this shaft and finding the Campbell & Tobin discovery, as above described, sufficient, thereupon located said vein on July 25, 1921. (Tr., pp. 113, 114.) He posted notice of discovery on the discovery stake at the Campbell & Tobin shaft and wrote upon said stake as follows: "That the undersigned a citizen of the United States having discovered at the place where this notice is posted on the 25th of July, 1921, a vein or lode of quartz or other rock in place bearing gold or other valuable mineral deposit does hereby locate and claim the same as the notice on initial post of lode mining claim. The general course of the vein or

lode, as far as the same can now be ascertained, is westerly and the undersigned hereby locates and claims the same 1500 feet in length and 50 feet in width in a westerly direction from the point of discovery where this notice is posted and a total width of 50 feet the same being 25 feet on each side of the center of said vein. Notice dated and posted this 25th day of July, 1921. This claim is known as the Hill Side Quartz Claim. Wm. Grant locator." (Tr., pp. 114, 115, 116.) Mr. Grant then proceeded to mark the boundaries of his Hill Side Lode Claim and placed three posts at or just below Quigley's lower end line: One, the center end post and the other two corner posts. He then went downhill 1450 feet from discovery and on the lower center end stake wrote substantially the same made as on the discovery stake. Placed his name thereon, date of location, name of the location, Hill Side Lode Claim and set out two corner stakes at the lower end line 25 feet on each side of the lower center end post. (Tr., pp. 116-118.)

Grant wrote on the southwesterly corner stake "Southwesterly corner of Hill Side Lode Claim, staked July 25, 1921. Wm. Grant locator." He placed arrows thereon one pointing uphill and the other pointing to the lower corner. He indicated on the other lower corner "Southeast," otherwise the writing was the same as the southwesterly corner. (Tr., pp. 118, 119.) These corner posts were over three feet high and from three to five inches in diameter. The center stake was a big one. (Tr., p. 119.) On the lower center stake Grant wrote

“Lower center stake of the Hill Side Lode Claim, staked July 25, 1921, claiming 1500 feet in an easterly direction to upper center post,” and signed his name. (Tr., pp. 119, 120.)

From these lower stakes the locator could and did see the upper end stakes. (Tr., p. 120.) On the upper center end stake this locator placed the same date as is contained in his location certificate. (Tr., pp. 120, 121.)

On the corner stakes of the upper end line he wrote the date of location, name of the claim, name of the corners and name of the locator. These upper corner stakes were four feet high and five or six inches square. (Tr., p. 121.) All six of these stakes were square. (Tr., p. 122.)

Wm. Grant based his location of the Hill Side Bench Claim on the discovery which Campbell & Tobin had made. He called it then a “known lode.” He regarded it as a known lode after Campbell & Tobin had opened it up. Prior to that time it was not known. (Tr., pp. 122, 123.)

July 26, 1921, Wm. Grant filed for record with the recorder of said Kantishna Precinct his location certificate to said Hill Side Quartz Claim. (Plffs. Ex. “C.” (Tr., pp. 124, 125.)

Grant’s Hill Side Quartz Claim lies substantially within the boundary lines of Campbell & Tobins’ quartz claim (The Silver King Lode Mining Claim), (Tr., pp. 125, 126.)

There is an abundance of testimony proving that Campbell & Tobin, after sinking a few feet in a hole

about 14 feet to the right or up Moose Creek from Grant's hole, 12 feet deep, took possession of Grant's 12-foot hole, and sank therein to a depth of 40 feet, and that they did not know of the existence of a vein or lode until they had prospected to that depth. (Tr., p. 444, 445, 295, 296, 217-219, 84-86, 562-564.)

### LEGAL QUESTIONS INVOLVED.

The foregoing statement of facts necessarily involves the following legal questions:

- 1st. Did Wm. Grant sufficiently comply with the placer mining laws of the United States and Alaska to locate a valid placer mining claim in the Hill Side Placer location.
- 2d. In view of its excess in area, did Wm. Grant cast off, expressly or impliedly, this excess contained in Quigley's Red Top Location, or did Quigley carve out the excess by his Red Top location, thus changing the boundaries of the placer claim, or eliminating therefrom all territory in which a known vein existed.
- 3d. Did the entry of Campbell & Tobin upon the placer mining claim and into Grant's 12-foot hole, without permission, and without the knowledge of its owner and without his subsequent ratification of such acts, constitute a trespass. If a trespass, could plaintiffs in error initiate or acquire any title to the quartz location.
- 4th. After the discovery of the lode by plaintiffs in error, and it thereby became a "known lode" within the exterior bound-



aries of Grant's placer claim as it then existed, did Wm. Grant have the same right to make a quartz location on this lode, as any other person, not connected with the trespass of Campbell & Tobin.

- 5th. Did the defendant in error sufficiently comply with the quartz mining laws of the United States and Alaska to constitute a valid quartz location in the Hill Side Lode Claim.
- 6th. Did the Court err in rejecting evidence offered by defendants below.
- 7th. Did the Court err in its instructions to the jury.

## I.

### GRANT'S HILL BENCH VALID PLACER LOCATION.

On September 10, 1919, William Grant, plaintiff in error, entered upon the ground in controversy, and after panning material taken from three holes in the ground, discovered gold, which he describes as fairly coarse. He testifies that, upon taking into consideration the character of the ground, and its formation and location with reference to other placer claims in the same vicinity, this discovery was sufficient to justify an ordinarily prudent man in expending further labor or money in developing the property for mining purposes. (Tr., p. 62.) There is no conflict of testimony upon the question of discovery. The evidence is sufficient in law to constitute a valid discovery.



Cascaden vs. Bartolis, 162 Fed. 267.

Lang vs. Robinson, 148 Fed. 799, 803.

Charlton vs. Kelly, 156 Fed. 433.

2 Lindley on Mines, 3 Ed., sec. 437.

April 19, 1920, Grant returned to the property, marked its boundaries by adopting two stakes of the well-known Horseshoe claim, an adjoining property, as two of Grant's corner stakes, and upon one of these adopted stakes placed his location as his initial stake and numbered it "1." John Hamilton, owner of said Horseshoe claim, was present, gave his consent to such adoption, and witnessed Grant's location. (Tr. pp. 64, 65.) The next day two other corner stakes were set in place, and all of said four corner stakes were numbered, the name of the claim and locator placed on each stake, and the stakes were described by the testimony of Mr. Grant as being equal to, and even larger than, the statute prescribed. All these stakes contained arrows pointing to the next nearest corner stake and the various stakes were in plain view to each other. The direct testimony of plaintiff below discloses a full and technical compliance with the statute, excepting that, instead of *placing* (italics ours) the first two corner stakes, as the statute directs, he *adopted* two of Hamilton's stakes, with Hamilton's consent. Counsel for plaintiffs in error insists upon such a technical interpretation of this statute as to contend that no stake, tree, stone or other monument can be adopted. We presume it is because the statute does not say so. The Court instructed the jury that "a substantial compliance

with the laws governing the location of quartz and placer mining claims is all that the law requires.”

The mining laws and the federal statutes concerning the same have very generally been construed liberally in favor of the locator. This liberality in construction has also been applied by most of the courts in construing state and territorial laws supplementary to the federal statutes.

2 Lindley on Mines, 3 ed., sec. 374, p. 887.

The marking upon the initial stake is herein described in our statement of facts (referring to the record).

The certificate of location was duly filed of record, and all acts as required by law, to constitute a valid placer location, were proven and the testimony concerning the same submitted to the jury. The jury necessarily found plaintiff's placer location to be valid. Counsel for plaintiffs in error attempts to raise a question of fact in regard to marking the boundaries, on account of a conflict in the testimony of plaintiff below, between his direct examination and his cross-examination. The discrepancy in this particular seems to exist, but the jury found the facts to be according to plaintiff's detailed testimony contained in his direct examination.

## II.

EXCESS AREA WAS CAST OFF AND ABANDONED BY PLACER CLAIMANT OR  
CARVED OUT BY QUIGLEY'S RED  
TOP QUARTZ LOCATION.

In our statement of facts we referred to the tran-

script showing that Grant's placer claim was larger than indicated by the calls in his notice of location. That subsequently Quigley was allowed to build, without objection, several buildings, which reduced in size the placer area. After this reduction, the placer claim was still excessive in area, and about August 7th, 1920, Quigley made a location of a quartz claim, extending down into the upper side of Grant's placer claim, which appropriated or carved out of this placer claim about 3.7 acres. (Tr. pp. 627, 628.) That the mouth of Quigley's tunnel, which is the nearest point to the amended lines of Grant's placer claim, is 173 feet therefrom. The jury necessarily found that the excess of this placer location was located by Quigley's quartz claim, with the consent of the placer claimant. The testimony is also sufficient to justify the Court in giving Instruction No. 40.

After Quigley's discovery of a vein, although within the boundaries of Grant's excessive placer claim, and after such vein was by Quigley duly located as a quartz claim, by marking the boundaries 173 feet or more from any point on a known vein, the ground so covered could no longer be considered within the boundaries of the placer location. The foregoing statement is made in view of the fact that Quigley's location was carved out of a part of the excessive placer claim, by the consent of, or with the knowledge and without the objection of, the placer claimant. As the jury found upon the testimony, it necessarily follows that, at the time of the entry upon Grant's placer claim by the plain-

tiffs in error, there was no known vein within such placer limits.

A locator may abandon any portion of his claim without forfeiting any rights to the remainder.

2 Lindley on Mines, 3 ed., sec. 365, sec. 448-c.

McIntosh vs. Price, 121 Fed. 716.

Zimmerman vs. Funchion, 161 Fed. 859.

Waskey vs. Hammer, 170 Fed. 31.

Jones vs. Wild Goose M. & P. Co., 177 Fed. 95.

### III.

## PLAINTIFFS IN ERROR WERE TRESPASSERS WHEN THEY ENTERED UPON GRANT'S VALID PLACER LOCATION.

The record discloses, as indicated in our statement of facts, that plaintiffs in error entered upon Grant's placer claim between May 25 and 30, 1921. That they then entered into and took possession of Grant's 12 ft. hole and continued to sink the same to a depth of 40 ft. from the surface, at which point they discovered a lode or vein on June 6, 1921, and by reason of such discovery located their claim in controversy herein. That during all of this time the placer claimant, William Grant, was absent and had no knowledge of such entry and prospecting until some time after the location of plaintiffs in error. That, soon after learning the foregoing facts and about June 25, 1921, Grant posted trespass notices upon his claim and in July of the same year reposted the same, they having been torn down, and while reposting such trespass



notices Grant was knocked down by a rock thrown by plaintiff in error Campbell.

It is, therefore, undisputed that Grant had no knowledge of such trespass until after the quartz location, and that he, said Grant, never ratified the same.

Grant, owning a valid placer mining claim at the time of the entry, prospecting, and location of plaintiffs in error, he possessed property in the highest sense of that term and he was entitled to the right of exclusive possession, and actual possession thereof was no more necessary for the protection of his title than for any other grant from the United States.

2 Lindley on Mines, 3 ed., sec. 539.

Belk vs. Meagher, 104 U. S. 79, 26 L. Ed. 735.

Gwillam vs. Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 39 L. Ed. 348.

Duffield vs. San Francisco Chemical Co., 205 Fed. 485.

In which case this Court declares that the locator of a vein, after prospecting for such vein, had no right to enter for such purpose "if there were valid placer claims covering the same ground." In this case, however, the Court held that the prior placer location was invalid.

Clipper Min. Co. vs. Eli Min. & Land Co., 194 U. S. 220, 226; 24 S. Ct. 632, 28 L. Ed. 944.

The only exception to this right of exclusive possession is that where there is a *known* lode, any



qualified person may peaceably enter upon such placer ground and locate such known lode or vein.

Clipper Min. Co. vs. Eli Min. & Land Co. (Colo.), 68 Pac. 286.

Iron Silver Min. Co. vs. Reynolds, 124 U. S. 374, 8 S. Ct. 599.

To justify such entry the lode or vein must be *known*. A belief in its existence, however well-founded on theory, and facts known to exist outside of the boundaries of the placer claim, is not sufficient to constitute a known vein.

Sullivan vs. Iron Silver Min. Co., 143 U. S. 436, 12 S. Ct. 555.

In this case, veins or loads were known to exist on or in adjacent land, which were believed to extend into the ground in controversy, but the Supreme Court declares the law to be as above stated.

Iron Silver Min. Co. vs. Reynolds, *supra*.

Noyes vs. Nantle, 127 U. S. 348, 8 S. Ct. 1132.

The record in this case, referring to our statement of facts, indisputably discloses the fact that plaintiffs in error did not know of the existence of any vein or lode within the boundaries of the placer claim, after being reduced by Quigley, until they had reached a depth of 40 feet from the surface. At this point they made a discovery of a vein and located the same and gave the date of their discovery as June 6th, which date was some two weeks after their entry and after about two weeks' prospecting. They are bound by such date

of discovery as being the date of their first knowledge of the existence of the vein or lode.

The Supreme Court of Colorado, in the case of Clipper Min. Co. vs. Eli Min. & Land Co., *supra*, says: "So long, therefore, as lode claims are not known to exist within the limits of the prior placer claim at or before the time of the application for placer patent, it is unlawful for one to go within its limits for the purpose of prospecting for, and with the hope of discovering, and locating them."

The Supreme Court of the United States, in Clipper Min. Co. vs. Eli Min. & Land Co., *supra*, by Justice Brewer, uses the following language: "We agree with the Supreme Court of Colorado as to the law when it says that one may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. Perhaps, if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work, and certainly if he acquiesces in their action, he cannot, after they have discovered a vein or lode, assert right to it, for generally a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer might not thereafter appropriate that which they have discovered by such search."

In the case at bar, no acquiescence upon the part of Grant could have existed, because the evidence

is undisputed that he was temporarily absent and had no knowledge of this trespass until after plaintiffs in error had prospected for about two weeks in the hole heretofore sunk by Grant, as aforesaid, and after they had discovered a vein and made a location thereon. The Court further says: "It would seem strange that one owning a vein, and having a right in pursuing it to enter beneath the surface of another's location, should be expressly forbidden (by section 2322, R. S.) to enter upon that surface, if at the same time one owning no vein and having no rights beneath the surface is at liberty to enter upon this surface and prospect for veins as yet undiscovered."

The contention that, if a vein has its apex within the limits of a placer claim, a stranger can enter upon, sink a shaft, and search for such vein, and obtain title thereto, without the consent of the owner of the placer, is answered in the foregoing opinion as follows: "If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface." "Of what value, then, would the placer be to the locator?" "Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface he cannot continue his working." "And if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely destroyed."

That no rights of location can be initiated as the result of a trespass is expressly recognized by the Supreme Court, through Justice Brewer, in Del

Monte Min. & M. Co. vs. Last Chance Min. & M. Co., 171 U. S. 55, 18 S. Ct. 895, and in Clipper Min. Co. vs. Eli Min. & Land Co. (Colo.), *supra*.

Counsel for plaintiffs in error, in his brief, at page 23, quotes 2 Lindley on Mines, 3 ed., sec. 413, giving Mr. Lindley's conclusions, as follows: "(2) Such lodes (referring to lodes 'found to exist') may be appropriated (a) by the placer claimant or (b) by others, provided the appropriation is effected by peaceable methods and in good faith." We submit that this statement of Mr. Lindley is not complete and does not furnish authority that such lode may be discovered without the knowledge or consent of the placer claimant as the result of prospecting and exploration by a stranger. Mr. Lindley quotes the Clipper case apparently to sustain some statements which are not therein sustained, but confused with other problems, and we refer to the last part of the last paragraph of section 619, 2 Lindley on Mines, 3 ed., and submit that said last part of said sentence is not sustained by any adjudicated case, but that the first part of said sentence is sustained by the Clipper case.

On page 286 of Morrison's Mining Rights, 15th ed., the author says: "It has been held that no third party can enter within the limits of a placer location to prospect for lodes." "And if he does so enter, discover, and locate a lode, it is a claim initiated by trespass and is void." Citing Clipper Min. Co. vs. Eli Min. & Land Co., 194 U. S. 220, 48 L. Ed. 944, 24 S. Ct. 632. The law, therefore, as contended herein, seems to have been conclusively



determined by the U. S. Supreme Court in the opinion of Mr. Morrison.

#### IV.

AFTER THE DISCOVERY OF A LODE BY PLAINTIFFS IN ERROR, NOTWITHSTANDING THEIR VOID LOCATION OF SUCH LODE, MR. GRANT, OWNER OF THE PLACER, HAD THE RIGHT TO LOCATE SUCH LODE.

Mr. Lindley states, on page 963, sec. 413, 2 Lindley on Mines, 3 ed., that: "There is no reason why a placer claimant may not locate a lode claim within his unpatented placer claim, or consent that others may do so." Citing *McCarthy vs. Speed*, 11 S. D. 362, 77 N. W. 590, 592, 50 L. R. A. 184, and *Clipper Min. Co. vs. Eli Min. & Land Co. (S. Ct.)*, *supra*.

Plaintiffs in error, by their wrongful prospecting, uncovered a vein. Notwithstanding that this was done in trespass and that they could not thereby initiate title, others not connected with such trespass could have located the same as a known vein. This was done by the defendant in error.

#### V.

DEFENDANT IN ERROR LOCATED THE HILL-SIDE LODE CLAIM BY COMPLYING WITH ALL PROVISIONS OF LAW CONCERNING QUARTZ LOCATIONS.

It is disclosed in our statement of facts, referring to the transcript of record, that all necessary acts to make this lode location were performed by plain-



tiff below. There is no contention to the contrary on the part of plaintiffs in error, saving and excepting the fact that they apparently contend that this lode was not open for location, by reason of their title which is by them contended for herein.

The Court properly excluded the proposed testimony of the proposed witness John A. Davis. The only error alleged upon the Court's ruling on objections to evidence offered is disclosed on pages 13, 14, and 15 of the brief of plaintiffs in error. Counsel fails to set forth in his brief the proceedings concerning the same. It appears, however, that the proposed testimony of Davis was concerning Davis' investigation of the premises and vicinity, made in September, 1921, three months after the pretended location of plaintiffs in error. For this reason the testimony was properly excluded. Counsel states in his brief, at page 15, that Mr. Quigley testified to the same things that he expected to prove by the said Davis. This is a statement not justified by the record, but, if true, it renders the proposed testimony of Davis merely cumulative.

The offered testimony of Mr. Davis, the instructions of the Secretary of the Interior protesting against employees of the Bureau of Mines testifying (upon the grounds that same is against public policy, etc.), the preliminary questions concerning the same, the statement of what counsel for defendants below expected to prove, the objection by plaintiff's counsel, the remarks of the Court and of counsel, and the statements of said proposed witness, together with the ruling of the Court exclud-

ing said proposed testimony, are all disclosed on pages 473-477, inclusive, of the transcript of record. If the Court erred, such error should have been shown in detail in the brief of plaintiffs in error, under the rules of this Court. We submit, in the event this Court goes beyond counsel's brief and examines the record, that it will appear that the Court justified, upon the ground of public policy, in excluding the proposed testimony; that such proposed testimony was, according to counsel, merely cumulative; that the objection of plaintiffs below was well taken, because the proposed testimony related to an investigation made after plaintiffs in error had made their pretended location; and that the proposed testimony did not purport to give any positive or known proof of a vein or lode existing within the boundaries of plaintiff's placer location, but, on the contrary, consisted of the advancement of a theory and upon extrinsic facts which would be merely in aid of the theory or belief that a lode existed in the placer claim.

## VII.

### THE COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

We submit that, in the brief of plaintiffs in error, counsel has failed to set out separately and particularly the errors assigned and relied upon and has failed to set forth the instructions given and instructions refused in such assignment of errors. In the event that this Court goes beyond said brief and examines the various assignments of errors relied upon, we submit that it will find: (1) That

the law and proceedings of this case have been covered in his brief; (2) that an inspection of the instructions of the Court to the jury, when considered as a whole, discloses no fatal error on the part of the trial Court.

The judgment of the lower Court, based upon the verdict of the jury, should be affirmed.

Respectfully submitted,

MORTON E. STEVENS,

Attorney for Defendant in Error.

Due service of a typewritten copy of the foregoing brief admitted this 22d day of October, 1923, and the service of a printed form of said brief is hereby waived.

R. F. ROTH,

Attorney for Plaintiffs in Error.

R. O.













